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WOMEN'S HUMAN RIGHTS: FROM PROGRESS TO TRANSFORMATION

An Intersectional Response to Nussbaum

*Shreya Atrey**

Abstract

This article asks 'the intersectional question' about women's progress. The purpose is to understand whether the successes of the women's movement and women's human rights have improved the conditions of women who are disadvantaged not only because of their sex or gender but also disadvantaged by their race, colour, caste, religion, region, disability, age, sexual orientation, etc. It takes its cue from an account of the matter laid out by Martha Nussbaum. I contend that Nussbaum's view of women's progress, especially under CEDAW, does not consider the substantive and strategic implications of intersectionality and thus is not transformative in nature. The central argument then espouses a normative vision of women's progress which is intersectional such that it reflects and improves the lives of all women in the specific ways in which they are affected by multiple and overlapping systems of disadvantage and in turn subverts and transforms these systems.

1. Introduction

In Kimberlé Crenshaw's seminal article which coined the term 'intersectionality', she imagines discrimination as a basement.¹ The basement consists of stacks of people standing feet on shoulders. At the bottom are those who are disadvantaged in all possible ways on the basis of their race, sex, gender, class, caste, religion, sexual orientation, disability, age, marital status, etc; while those who were disadvantaged by a single characteristic alone inhabit the ceiling. Above the ceiling is the floor on which everyone who is not disadvantaged in any way resides. Crenshaw argues that when a hatch is developed for the disadvantaged people in the basement to escape to the floor above, it is generally those who lie just below the floor and on top of the basement who break free. Thus, the hatch allows only those who are singularly burdened to leave the basement of discrimination, unless those who are multiply-burdened 'can somehow pull themselves into the groups that are permitted to squeeze through the hatch.'²

The metaphor exemplifies the condition of women. The basement consists of all the women disadvantaged not only on the basis of their sex or gender but also because they are disabled, gay, poor, minor, single, old etc and belong to a minority race, religion, or caste in a particular context. At the top are women who are privileged in every way except for their sex or gender. On an international plane, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides the hatch for women to escape the basement.³ Women's transition to the floor above—which brings them on par with men—marks the

* Lecturer, University of Bristol Law School. BA LLB (Hons) (NALSAR), BCL (Dist) (Oxon), DPhil (Oxon). Many thanks are due to colleagues at the University of Bristol Law School, especially those at the International European and Human Rights Primary Unit seminar who read and commented on the paper most generously.

¹ Kimberlé W Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) University of Chicago Legal Forum 139.

² *ibid* 65.

³ UN General Assembly, adopted 18 December 1979, entry into force 3 September 1981, United Nations Treaty Series, vol. 1249, p. 13.

progress in the movement for women's equality and human rights. Yet, because inequality is arranged in a disparate and hierarchical fashion, it is often not easy for women at the bottom (who are multiply disadvantaged, say as poor disabled Black lesbians) to be able to progress just as easily as women at the top (who are disadvantaged only because they are women, like non-disabled white heterosexual middle-class women).

What does this mean for the success of the hatch? One way to see it is that, while progress can be traced for every woman who crosses over to the other side, it remains partial and not entirely transformative when others remain consigned to the basement. But given that the hatch is nevertheless available, women at the bottom too, may occasionally and bravely, pull themselves through it. Unlike the progress in the first case, their transition is complete and transformative. It is complete because it includes not only women who are relatively privileged but also those at the bottom of the hierarchy. Consequently, it is transformative in that it transforms the basement or structures which are organised to trap women who are severally and severely disadvantaged. Thus, if a mere upward progression from the basement is one-dimensional, transformation is intersectional so to say. The success of the women's movement and women's human rights, lies in not just devising a hatch and letting some escape through it, but making such progress transformative in terms of uplifting all women through the hatch, including those who suffer from the worst forms of intersectional disadvantage, and in the process, dismantling the structures and relationships of power which create such disadvantage.

What has CEDAW achieved in this regard? This article considers this question. It does so in response to a seminal account of the matter laid out by Martha Nussbaum in her 2016 article 'Women's Progress and Women's Human Rights.'⁴ Drawing on examples which underline the social, political, and legal implications of CEDAW, Nussbaum argues that CEDAW has played a small, but not so insignificant, role in strengthening women's movement and women's human rights. Nussbaum delineates two such contributions. First, the social and political importance of CEDAW in supporting the international women's movement in developing 'a sense of common purpose, a common language, [and] a common set of demands'.⁵ Second, the 'real, if limited, legal significance' of CEDAW when it is invoked by friendly jurists around the world. Thus, Nussbaum argues that 'the influence of international human rights ought to be assessed, often at least, in this broader way, looking at the role of the documents [like CEDAW] in political and social movements.'⁶

This is all too brief a summary of Nussbaum's extensive account of CEDAW in the women's movement. Nussbaum's detailing, which cannot with any sincerity be reproduced here, is rich and revealing. She gives numerous and varied examples for her claims, provides pointed statistics, refers to myriad contexts (USA, Italy, New Zealand, India, and Botswana), and presents her conclusions in a broad light. In the rest of the article, I deal with her finer points at appropriate places. But in order to make sense of the whole and to understand where the present critique comes from, let us, for a moment, return to the basement metaphor. Nussbaum's article provides an illuminating account of the ceiling, i.e. women's disadvantage based on sex or gender, the development of the hatch of CEDAW, and the use of the hatch for progressing from the ceiling to the floor above, where everyone enjoys equality and human rights.

⁴ Martha Nussbaum, 'Women's Progress and Women's Human Rights' (2016) 38 Human Rights Quarterly 589.

⁵ *ibid* 589.

⁶ *ibid*.

But she misses the whole picture in failing to consider the rest of the basement which consists of women who are multiply disadvantaged, i.e. women who are not just disadvantaged because they are women but also because they are poor, disabled, gay, aged, young, Black/Dalit/Roma/Muslim, etc. Their intersectional disadvantage complicates the view of the progress made by those already at the ceiling; such that their inclusion transforms women's inequality, while their exclusion diminishes the gains made.

This article takes a cue from Nussbaum's assessment, especially the examples she uses, to ask 'the intersectional question' about women's progress and women's human rights. It challenges Nussbaum's evidence in support of her final conclusion because it does not account for the way women's inequality is actually organised—in the scheme of the basement metaphor—intersectionally. If one considers the intersectional implications of the examples Nussbaum cites to make her central claims, a different reality emerges. Thus, applying a Dalit feminist perspective to CEDAW's contribution to the transnational women's movement, it appears that CEDAW was influential not (only) because it provided a 'common' purpose, language or set of demands but quite the contrary—it was the intersectional space provided by CEDAW to women's movements to articulate not just their commonalities but their differences which made CEDAW so important and in fact, transformative.⁷ The movement thus strengthened not *because* but *inspite* of the rhetoric of commonness, and instead, for its appreciation of commonalities *and* differences in the same breath. On the other hand, the example of Dalit women also makes clear that CEDAW's legal significance when applied directly by justices, such as in India, is partial at best. The erasure of caste and class injustices from the assessment of cases of sexual violence against women (which were nevertheless progressive), represents a form of progress which is far from transformative. This is true of the Indian Supreme Court's landmark judgment in *Vishaka v State of Rajasthan*⁸ which is cited by Nussbaum as the hallmark of the direct effect CEDAW can have in municipal law. But in fact, in addressing mainly the condition of upper-caste middle-class women, and leaving intact the position of subordination of poor Dalit women, *Vishaka* may be considered less effective in its enforcement of CEDAW than Nussbaum believes. A fuller consideration of the instances of invocation of CEDAW in India reveals fortuitous successes, missed opportunities, and even glaring oversights which complicate our view of the direct enforcement of CEDAW at the national level. So in the final analysis, though much like Nussbaum, I underwrite the modest success of CEDAW in supporting and fortifying the women's movement and progress, I do so for reasons quite different from those of Nussbaum. My argument is that intersectionality modifies our understanding of progress, such

⁷ Dalit feminism explains the unique position of Dalit women who are subordinated not only by their gender alone, but by their gender, caste, and class at the same time. The term 'Dalit' literally translates to 'broken', and is used as a label of assertive pride for all out castes or lower caste persons in India (also referred to as the 'Scheduled Castes' under the Constitution of India, see arts 341-42). The caste system itself is a system of social inequality where everyone born into the Hindu religion to designated a caste based on birth/lineage. The Hindus are divided into four major castes or 'varnas': the Brahmins (priests) at the top, Kshatriyas (warriors), Vaishyas (merchants) and the Shudras (labourers) at the bottom of the hierarchy. See for a comprehensive review of the caste system in India: Marc Galanter, *Competing Inequalities: Law and the Backward Classes in India* (OUP 1984). See accounts of Dalit feminism in Uma Chakravarti, *Gendering Caste: Through a Feminist Lens* (Stree 2009); Anupama Rao (ed), *Gender and Caste: Issues in Contemporary Indian Feminism* (Kali for Women 2005); PG Jogdand (ed), *Dalit Women in India: Issues and Perspectives* (Gyan Publishing House 1995).

⁸ *Vishaka v State of Rajasthan* 1997 AIR 3011 (Supreme Court of India).

that progress which is transformative in nature takes into account the situation of intersectional groups, while progress which does not consider the impact on intersectional groups is, at best, a qualified one. While CEDAW seems to have moved in both the directions, its jurisprudence and influence has been increasingly and decidedly intersectional in the course of its development over the last four decades. It is this inclusive and hence transformative progress which makes CEDAW so relevant.

These are the specific and contrary claims I make in arriving at, what is ultimately, a shared conclusion with Nussbaum. The retelling of CEDAW's impact story matters for several reasons. First and foremost, it matters in an epistemic sense for us to know why CEDAW may have succeeded. Here my reasoning differs from Nussbaum's in a fundamental way. Nussbaum either disconsiders intersectionality or considers it, especially in relation to sexuality and caste, wilfully set aside 'strategically', though she agrees, 'at a cost'.⁹ Instead, I consider for substantive and strategic reasons that intersectionality is inescapable both in the women's movement and in CEDAW. That is, intersectionality is central to our understanding of what women's inequality and denial of human rights looks like and is thus being conceptually and strategically embraced in the women's movement and CEDAW alike; its reckoning contributing to their successes and its denial contributing to their failures. Second, this epistemic point can be appreciated only when the ontological reality of intersectional disadvantage suffered by women *not only as women* is appreciated. This requires engagement with the subaltern experiences that are ordinarily disguised or in conflict with the 'mainstream' account of women's human rights. In offering such an engagement from a Dalit feminist perspective, the aim, as Susie Tharu and Tejaswini Niranjana argue, 'is to initiate a polemic that will render visible the points of collision and the lines of force that have hitherto remained subterranean, and construct instruments that will enable struggles on this reconfigured ground.'¹⁰ The article considers CEDAW as an instrument or hatch which allows women's struggles to unfold and succeed on this reconfigured ground made of subaltern/subterranean/Dalit feminist/intersectional perspectives. Third, this in turn is possible when women's struggle and CEDAW is looked at in context. In spite of the shared experience of women's disadvantage around the world, specific forms of sex discrimination both further illuminate the shared experience, and at the same time, diversify it. Context then deepens our discussions of transnational movements and international instruments by embedding them in local and specific experiences.¹¹ In this, I follow Susanne Zwingel, who gauges CEDAW's impact by focussing 'on creating and maintaining connections and takes interest in micro-level processes rather than identifying large-scale causal patterns. This perspective helps to develop a

⁹ Nussbaum (n 4) 609.

¹⁰ Susie Tharu and Tejaswini Niranjana, 'Problems For a Contemporary Theory of Gender' in Shahid Amin and Dipesh Chakrabarty, *Subaltern Studies IX: Writings on South Asian History and Society* (OUP 1996) 237.

¹¹ The idea that women's rights are negotiated contextually is different from critiques of cultural relativism which challenge the transcendence of universal human rights, whilst the short point about context and intersectionality is to challenge the universality in the *experience* of rights and their violations. See for cultural relativism in women's human rights, Susan M Okin, 'Gender Inequality and Cultural Differences' (1994) 22 Political Theory 5; Annie Bunting, 'Theorizing Women's Cultural Diversity in Feminist International Human Rights Strategies' (1993) 20 Journal of Law Society 6; Fernando R Teson, 'International Human Rights and Cultural Relativism' (1985) 25 Virginia Journal of International Law 869.

de-centered and de-essentializing vision of global norms.’¹² Maitrayee Chaudhuri also remarks that, ‘[t]he context, within which concepts emerge and the contexts where they travel to, needs enunciation. Its significance in an increasingly globalized academia cannot be overstated. Hence the focus here is on both the tale and [its] telling.’¹³ Taking a cue from Chaudhuri, I transpose CEDAW from its ‘Western’ origins to a context it has travelled to: of Indian women’s movement and law.¹⁴ While Nussbaum uses the United States as her interlocutor in examining CEDAW and international women’s movement’s broader significance (even though the US is not a party to CEDAW), I employ India and its rich engagement with CEDAW and women’s movement abroad to reflect on both their direct and indirect impact. Thus, in contrast with Nussbaum’s ‘broader way, looking at the role of the documents [like CEDAW] in political and social movements,’¹⁵ the article zooms in on particularized protectorates, contexts, and forms of analyses including intersectional, postcolonial, third world, and Dalit feminism, which ultimately not only changes the telling of the tale, but the tale itself.

The article proceeds as follows. Section 2 explains what is meant by an intersectional view of progress (2.1), why it matters for transformative purposes (2.2), and to what extent CEDAW embraces the notions of intersectionality and transformation (2.3). Section 3 tackles Nussbaum’s claim about the success of the direct enforcement of CEDAW from a Dalit feminist perspective. It responds to Nussbaum’s specific claim about the direct effect of CEDAW by telling a different, more sober, story about the ‘success’ of CEDAW in cases like *Vishaka* and corroborating this account with the disjunct judicial interpretations of CEDAW at the municipal level. In particular it critiques the direct enforcement of CEDAW in *Vishaka* for failing to appreciate the nature of violence against Dalit women (3.1); and takes a comprehensive look at the way CEDAW has been invoked domestically by the Indian Supreme Court (3.2). Section 4 describes the ways in which CEDAW has turned its cases of limitations into spaces of possibilities, especially in enabling intersectional groups within the women’s movement. It has thus supplanted its rhetoric of commonness with differences amongst women, allowing movements like the Dalit feminism to engage with the transnational women’s movement in the backdrop of CEDAW (4.1); and has even addressed acute and specific issues concerning women, viz. abortion, contraception, and sexuality, through targeted intervention (4.2). Section 5 concludes with joining Nussbaum in her central hypothesis about the significance of CEDAW. It closes by reiterating that our

¹² Susanne Zwingel, *Translating International Women’s Rights: THE CEDAW Convention in Context* (Palgrave MacMillan 2016) 8.

¹³ Maitrayee Chaudhuri, ‘Feminism in India: The Tale and Its Telling’ (2012) 209 *Revue Tiers Monde* 19, 35 (emphasis in original).

¹⁴ As Chandra Talpade Mohanty points out sharply: ‘it is both to the *explanatory potential* of particular analytic strategies employed by such writing [generalising on women], and to their *political effect* in the context of the hegemony of Western scholarship, that I want to draw attention here...Western feminist writing on women in the third world must be considered in the context of the global hegemony of Western scholarship-i.e., the production, publication, distribution and consumption of information and ideas. Marginal or not, this writing has political effects and implications beyond the immediate feminist or disciplinary audience. One such significant effect of the dominant “representations” of Western feminism is its conflation with imperialism in the eyes of particular third world women. Hence the urgent need to examine the political implications of analytic strategies and principles.’ Chandra Talpade Mohanty, ‘Under Western Eyes: Feminist Scholarship and Colonial Discourses’ (1984) 12 *boundary 2: On Humanism and the University I: The Discourse of Humanism* 333, 334 (emphasis in original, citations omitted).

¹⁵ Nussbaum (n 4) 594.

interpretation of the impact of international instruments like CEDAW must be intersectional in order to gauge whether women's progress is transformative.

2. An Intersectional View of Progress

2.1 Why Intersectionality?

Nussbaum opens the article with a proclamation: 'Women are making progress.'¹⁶ She cites impressive data in this regard.¹⁷ Every country in the world has given women the right to vote. The number of female legislators in national parliaments has nearly doubled in the last thirty years. Women's enrolment in primary and secondary education is now on par with men. Women are working for gainful employment far more than before and women's poverty is decreasing around that world. Women's health has also improved; life expectancy at birth has increased by about twenty years in the last six decades. Even in the most recalcitrant areas, 'there is an emerging international consensus that [for example] violence against women ought to be taken more seriously.'¹⁸

Nussbaum's observations are incontrovertible. Women indeed are making progress. Consolidated statistics from around the world confirm Nussbaum's sense of women's progress. Even in India, the world's most populous democracy with 1.3 billion people, women have made tremendous strides.¹⁹ Women not only achieved the right to vote at the same time as men in 1950 when independent India's Constitution was adopted, they are now voting almost on par with men.²⁰ The number of female legislators, though still very low, has shown upward progression with women taking up 66 of the 543 elected seats in the Parliament, the highest ever in the history of the country.²¹ The female literacy rate at 65.46 percent, while well below the world average of 79.7 percent, has increased faster (11.8 percent) than that of men (6.9 percent) in the 2001-2011 decadal period²² and has steadily improved since the abysmal 8.86 percent recorded during the first census in 1951.²³ Maternal mortality rate has declined faster than the global target²⁴ and life expectancy has improved

¹⁶ *ibid* 590.

¹⁷ *ibid* 590-591.

¹⁸ *ibid* 592.

¹⁹ Though it must be noted that despite being the most populous democracy, India's sex ratio has not improved and has even dropped since independence with the census in 2001 yielding the figure of 933 women per 1000 men as compared to the 1951 census figure of 946 per 1000 men. See 'Sex Composition of the Population' (2001) Census of India <http://censusindia.gov.in/Data_Products/Library/Provisional_Population_Total_link/PDF_Links/chapter6.pdf> (accessed 10 October 2017).

²⁰ In the last national (general) election in 2014, men voted at 67 percent while women at 66 percent. Rajeshwari Deshpande, 'Women's Vote in 2014' (25 June 2014) *The Hindu* <<http://www.thehindu.com/opinion/op-ed/womens-vote-in-2014/article6151723.ece>> (accessed 11 September 2017).

²¹ 'Profile of the 16th Lok Sabha' <<http://www.prsindia.org/media/media-updates/profile-of-the-16th-lok-sabha-3276/>> (accessed 11 September 2017).

²² 'Women's Education in India: How Serious are we Really?' (13 October 2015) *Women's Web* <<http://www.womensweb.in/2015/10/women-education-in-india/>> (accessed 11 September 2017).

²³ 'Literacy in India: Steady March over the Years' (6 September 2003) Ministry of Human Resource Development <<http://pib.nic.in/archive/releases98/lyr2003/rsep2003/06092003/r060920031.html>> (accessed 11 September 2017).

²⁴ Rhythma Kaul, 'India's Maternal Mortality Rate on a Decline' (27 May 2017) *The Hindustan Times* <<http://www.hindustantimes.com/health/india-s-maternal-mortality-rate-on-a-decline/story-ZcnBG0kidtvPEkRnKNI0II.html>> (accessed 11 September 2017).

vastly.²⁵ Though women's labour force participation in India has declined to be amongst the lowest in the world, there are some efforts to recognise women's labour at home and in informal occupations.²⁶ Similarly, although sexual violence has been depressingly persistent, the outrage against it has categorically intensified.²⁷

These statistics are clear in two respects—first, women have made progress comparatively vis-à-vis men; and second, women have made progress in a temporal sense, as against the condition of women in the preceding decades. These statistics though do not tell us whether women have made progress in an intersectional sense, i.e. across women and as a whole. This begs the question whether all women have progressed? Who made progress and who was left out? Disaggregating women's statistics helps understand progress further.

Take for example the case of 100 million Dalit women, who constitute a fifth of about 500 million women in India.²⁸ Of the 66 women elected to the 16th Parliament (Lok Sabha), 11 are Dalit.²⁹ But this political participation does not squarely translate into socio-economic advancement of Dalit women in general.³⁰ Over 70 percent of Dalit women remain illiterate and live in rural India.³¹ 52 percent of Dalit women earn their livelihood as agricultural wage labourers as compared to 17 percent of upper-caste women.³² In terms their daily wages, Dalit women average at 37INR per day (approx. 0.55USD) as compared to 56INR (approx. 0.85USD) earned by upper-caste women and the national average of 42INR (approx. 0.65USD).³³ As a result, over 30 percent of Dalit women live in extreme poverty as compared to 11 percent upper-caste women. The mortality rate of Dalit women is 39.5 years, which is 14.6 years less than that of upper-caste women (54.1 years).³⁴ Even sexual violence, although universally difficult and specifically so in India, becomes far worse in relation to Dalit women. Dalit women remain thrice as likely to face sexual violence on the basis of their caste, class, and gender, and rarely if ever report such violations

²⁵ R Prasad, 'Increase in Life Expectancy more in Women in India' (18 December 2014) The Hindu <<http://www.thehindu.com/sci-tech/health/increase-in-life-expectancy-more-in-women-in-india/article6701372.ece>> (accessed 11 September 2017).

²⁶ See Urmila Chatterjee, Rinku Murgai and Martin Rama (2015), 'Job Opportunities along the Rural-Urban Gradation and Female Labor Force Participation in India', Policy Research Working Paper 7412, World Bank.

²⁷ Though the outrage, as I also point out later, is selective, and seldom expressed beyond class and caste lines. See Kalpana Sharma, 'Is Violence the New Normal' (5 December 2015) <http://www.thehindu.com/opinion/columns/Kalpana_Sharma/kalpana-sharma-asks-if-violence-against-women-is-the-new-normal/article7948830.ece> (accessed 10 October 2014); Ratna Kapur, 'Normalising Sexual Violence' (5 June 2014) The Hindu <<http://www.thehindu.com/opinion/op-ed/normalising-sexual-violence/article6082831.ece>> (accessed 10 October 2014).

²⁸ See the website of the Office of the Registrar General & Census Commissioner, India for gender composition recorded in the last census in 2011 <http://censusindia.gov.in/Census_And_You/gender_composition.aspx> (last accessed 2 October 2017).

²⁹ Nidhi Sadana Sabharwal and Wandana Sonalkar, 'Dalit Women in India: At the Crossroads of Gender, Class, and Caste' (2015) 8 Global Justice 44, 61.

³⁰ In fact, Dalits are peculiar in that they have amassed vast political power especially in some large and prominent states like Uttar Pradesh in India despite being one of the most disadvantaged and discriminated social groups. See Sudha Pai, *Dalit Assertion and the Unfinished Democratic Revolution* (Sage 2002).

³¹ 'Now we are Fearless: Facts about Dalit Women' <<http://www.overcomingviolence.org/en/resources/campaigns/women-against-violence/now-we-are-fearless/dalit-fact-sheet.html>> (accessed 11 September 2017).

³² Sabharwal and Sonalkar (n 29) 53.

³³ *ibid* 54.

³⁴ *ibid* 63.

or are served justice when they do.³⁵ Only 1 percent of rape cases reported by Dalit women ever end up in convictions as compared to 25 percent of rapes reported by upper-caste women.³⁶ Even temporally, these statistics are not ones of progress but signify historical and abiding patterns of discrimination and violations of human rights.³⁷ Dalit women's suffering continues unabated, as against men, other (upper-caste middle-class) women, and even as against the passage of time.

The condition of Dalit women puts a dent in our confidence over women's progress. The condition of other intersectional groups of women unsettles us further. For example, Black women, disabled women, indigenous women, Roma women, and bisexual, transgender and lesbian women, all face far greater risk of sexual abuse or gender-based violence than women who are not Black, disabled, Roma, belonging to indigenous populations and sexual minorities.³⁸ So while women are making progress, the condition of women who also belong to other disadvantaged groups is not improving nearly as much as or as fast as, men and other women who are disadvantaged only because of their sex or gender. The question that arises then is how do we understand progress which is so disparate? Is progress *progress* if some are not part of it? The next section explains what it means for women's equality and human rights to be understood intersectionally and why intersectionality begets progress which is both inclusive and transformative in nature.

2.2 Intersectionality and Transformation

The term 'intersectionality' was coined by Crenshaw in 1989.³⁹ Her contribution both drew on and then went on to develop over two centuries of Black feminist thought in the US.⁴⁰ The running thread in the long intellectual history of intersectionality is the challenge to 'the dominant conception' of understanding disadvantage or

³⁵ See for example the specific case of Domestic Violence Act 2005 enacted to give force to India's international obligations under CEDAW in Sujata Gadkar-Wilcox, 'Intersectionality and the Under-Enforcement of Domestic Violence Laws in India' (2012) 15 University of Pennsylvania Journal of Law and Social Change 455.

³⁶ [IDSN briefing paper on Dalit Women](http://idsn.org/fileadmin/user_folder/pdf/New_files/Key_Issues/Dalit_Women/DALIT_WOMEN_-_IDSN_briefing_paper.pdf) http://idsn.org/fileadmin/user_folder/pdf/New_files/Key_Issues/Dalit_Women/DALIT_WOMEN_-_IDSN_briefing_paper.pdf (accessed 11 September 2017); Palak Nandil, 'Dalit Women Cases: Crime Conviction Rate Poor' (7 June 2011) The Times of India <http://timesofindia.indiatimes.com/city/jaipur/Dalit-women-cases-Crime-conviction-rate-poor/articleshow/9131045.cms?referral=PM> (accessed 11 September 2017).

³⁷ See references for Dalit feminist discourse in (n 7).

³⁸ See Kimberlé W Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 Stanford Law Review 1241; Jennifer M Mays, 'Feminist Disability Theory: Domestic Violence against Women with a Disability' (2007) 21 Disability and Society 147; Roderick Brown, 'Corrective Rape in South Africa: A Continuing Plight despite an International Human Rights Response' (2012) 18 Annual Survey of International & Comparative Law 45; Alexandra Oprea, 'Re-envisioning Social Justice from the Ground Up: Including the Experiences of Romani Women' (2014) 1 Essex Human Rights Review 29.

³⁹ Crenshaw, 'Demarginalizing' (n 1).

⁴⁰ This section cannot do justice to the vast breadth of literature which inhabits the 'burgeoning field of intersectional studies.' (Sumi Cho, Kimberlé W Crenshaw, and Leslie McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis' (2013) 38 Signs 785). It thus selectively refers to some of the key contributions that have defined the field, to distil a broad and common theme which has evolved over much debate, critique, and defence. For longer, more comprehensive accounts see Ange-Marie Hancock, *An Intellectual History of Intersectionality* (OUP 2016); Vivian M May, *Pursuing Intersectionality: Unsettling Dominant Imaginaries* (Routledge 2015); Anna Carastathis, *Intersectionality: Origins, Contestations, Horizons* (University of Nebraska Press 2016).

discrimination as along a single independent axis of race, sex, gender, class, caste, religion, sexual orientation, disability, age, marital status etc.⁴¹ Under the dominant conception, sex discrimination is understood as discrimination *only* on the basis of sex, such that it protects only white women who are solely disadvantaged by their sex or gender but not because of race, religion, disability, sexual orientation etc. Similarly, the prohibition on race discrimination covers those disadvantaged by race alone, like straight non-disabled middle-class Black men. Within this monist conception of discrimination, Black women fall through the cracks of both sex and race discrimination because they are disadvantaged by neither sex nor race alone, but by *both of them at the same time*: their disadvantage as *Black women* being both similar to but also different from that faced by white women and Black men. Taking the example of Black women, intersectionality theory underscores that structures of disadvantage do not exist independent of one another but are constituted by multiple and intersecting relationships of power associated with people's race, sex, gender, class, caste, religion, sexual orientation, disability, age, marital status etc.⁴² Understood this way, intersectionality espouses anti-essentialism of categories like women and Blacks and of experiences of sex and race discrimination associated with them.⁴³ It decries the notion that sex discrimination or discrimination against women has an essence which can be understood separately from other kinds of inequalities of race, caste, religion, disability, sexual orientation, age, marital status etc, and thus urges for discrimination to be understood intersectionally or as a whole.

Intersectionality theory aims to 'go beyond mere comprehension of intersectional dynamics to transform[ing] them'.⁴⁴ In other words, intersectionality ultimately aims to transcend intersectional discrimination and bring about social transformation.⁴⁵ Such a transformation involves an overhaul of the structures and relationships of power in terms of unsettling institutional norms of hierarchical organisation which disadvantage certain people, especially those who belong to multiple disadvantaged groups.⁴⁶ It thus coincides with the vision of transformative equality or transformative justice based on values of inclusive participation,⁴⁷ accommodating difference,⁴⁸ and promoting social inclusion.⁴⁹ This involves a

⁴¹ Crenshaw, 'Demarginalizing' (n 1) 150.

⁴² See especially Crenshaw's account of violence against Black women explained in these terms in Crenshaw, 'Mapping the Margins' (n 38). Patricia Hill Collins calls this a 'matrix of domination' in *Black Feminist Thought* (2nd edn, Routledge 2009), and bell hooks terms it a 'politic of domination' in *Feminist Theory: From Margin To Center* (2nd edn, South End Press 2000) ch 2.

⁴³ Elizabeth Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Women's Press 1990); Angela P Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 *Stanford Law Review* 581.

⁴⁴ Cho, Crenshaw, and McCall (n 40) 786.

⁴⁵ See especially this connection developed in Patricia Hill Collins and Sirma Bilge, *Intersectionality* (Polity Press 2016).

⁴⁶ UN Women, 'A Transformative Stand-Alone Goal on Achieving Gender Equality, Women's Rights and Women's Empowerment: Imperatives and Key Components' (2013) <<http://www.ipu.org/splz-e/unga13/women.pdf>> (accessed 2 Sept 2017).

⁴⁷ Bob Hepple considers participation as key to transformation and his vision of transformative equality. Bob Hepple, 'Transformative Equality: The Role of Democratic Participation' paper presented at the Facing development: the North-South Challenge to Transnational Labour Law LLRN Conference in Barcelona June 2013 <https://www.upf.edu/documents/3298481/3410076/2013-LLRNConf_SirBobHepple.pdf/d2fc160a-5b89-456a-9505-bffa977796de> (accessed 2 September 2017).

⁴⁸ See the idea of transformation as accommodation of difference espoused by Sandra Fredman in her seminal account of multi-dimensional substantive equality in *Discrimination Law* (2nd edn, OUP 2011) ch 1. See also Cathi Albertyn, 'Substantive Equality and Transformation in South Africa' (2007)

commitment to leaving no one behind and bringing about change which transforms the lives of one and all. In terms of the basement metaphor, transformation means eliminating intersectional discrimination such that everyone transitions to the floor above, no matter how far down the basement of inequality they reside; and with this, upturning the organisation of the basement as a hierarchical structure of disadvantage.

Thus, to understand women's equality and human rights in intersectional terms means to understand that women are inhibited by multiple forms of structural disadvantage at once, and that the transformation of women's condition means uplifting all women from and upturning all structures of disadvantage.⁵⁰ Celina Romany calls for a reconceptualisation of women's human rights which would 'refine and deepen an understanding of multiple oppressions and put on the table the discourse of difference.'⁵¹ This means that great care must be taken to present analyses of women's human rights such that they reflect the diversity of women's experiences of inequality. According to Elizabeth Spelman, this requires spelling out the difference in terms of specifying *which* women one is talking about when talking about women.⁵² The specificity in women's identities and experiences foregrounds women's human rights into real and lived experiences, and thus abandons 'a "one-size-fits-all" approach to the definition and enforcement of human rights.'⁵³

So, intersectionality and its idea of progress as social transformation may be said to contribute to women's movement and women's human rights in two ways. First, theoretically it enlarges the conception of women's disadvantage to include intersectional violations which are either conceptually excluded or obscured from our vision. For example, it expands the domain of what counts as 'sex discrimination' or 'violations of women's rights' to include experiences of women who suffer not only as women but also as Blacks, disabled, Dalit, lesbians etc. Second, strategically it opens up ways of organising not only around commonalities but also around differences.⁵⁴ For example, intersectionality provides an opportunity to groups like Black women and Dalit women to build connections and solidarities within broader identity-groups like women, relate differently to other groups like Black and Dalit men on a reconfigured ground of intersectionality, and even deploy essentialism 'strategically' once both commonalities and differences are taken into account rather than discounted.⁵⁵ It thus furnishes a basis for strategies to be truly inclusive and effective, and hence transformative. Intersectionality is thus important not for any other purpose, but for the reason women's movement and women's human rights

South African Journal on Human Rights 257; Cathi Albertyn and Beth Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 South African Journal on Human Rights 248.

⁴⁹ Hugh Collins offers an account of social inclusion as the ultimate goal of equality law in 'Discrimination, Equality and Social Inclusion' (2003) 66 Modern Law Review 16.

⁵⁰ In the words of Lisa Crooms: 'In the international human-rights arena, women's human rights must reflect the multiple identities of women across cultural, national, religious, ethnic, and racial barriers.' Lisa A Crooms, 'Indivisible Rights and Intersectional Identities or, "What Do Women's Human Rights Have to Do with the Race Convention?"' (1996) 40 Howard Law Journal 619, 634.

⁵¹ Celina Romany, 'On Surrendering Privilege: Diversity in a Feminist Redefinition of Human Rights Law' in Margaret Schuler (ed), *From Basic Needs to Basic* (DC: Women, Law and Development International 1995) 549

⁵² Spelman (n 43) 186.

⁵³ Crooms (n 50) 634-35.

⁵⁴ Jennifer Nash puts it as the project of attending to both 'intersectionality's attention to difference while also strategically mobilizing the language of commonality.' Jennifer C Nash, 'Re-thinking Intersectionality' (2008) 89 Feminist Review 1, 4.

⁵⁵ This discussion features in section 4.2 below.

exist — for their theoretical coherence of relating to all women and their disadvantage, for being able to identify and redress such disadvantage; and for strategic reasons for building solidarity or unity in diversity, from the ground up not on high.

Conversely, in neglecting the theoretical and pragmatic dimensions of intersectionality, one produces a lopsided account of inequality and strategies to remedy them. Intersectionality is thus not just any other theory or critique of women's human rights. It is, I believe, the kernel of women's progress and human rights. It is about who we count as women in the movement, how we understand women's disadvantage, and how we want to see it addressed.

The question that arises in respect of CEDAW is, how far the document and its jurisprudence embrace intersectionality and its vision of transformation? The next section unearths CEDAW's slowly but surely growing intersectional roots.

2.3 CEDAW's Intersectional Transformation

At the outset, it is useful to note that intersectionality is no central theme of CEDAW. The term or its explanation does not feature in the text of CEDAW. The definition of 'discrimination against women' in article 1 is limited to 'distinction, exclusion or restriction made *on the basis of sex*' and does not refer to other grounds like race, caste, religion, region, sexual orientation, disability, age, marital status etc. Sporadic references to women's identities as mothers,⁵⁶ and wives,⁵⁷ and to rural women and poverty⁵⁸ hint at, but stop short of a clear commitment towards, understanding discrimination and women's human rights intersectionally. This brought academics and activists alike to pour scorn over CEDAW's fundamental reliance on comparison with men and ignoring inequalities between women.⁵⁹ The absence of expressly defining discrimination and violation of women's human rights in terms of women's other identities of race, class, caste, religion, sexual orientation, disability, age, marital status etc, was seen as limiting CEDAW to women who were disadvantaged only *as women* but privileged otherwise.⁶⁰

Yet, over the years, CEDAW has undergone an intersectional transformation of sorts; being opened up to such reinterpretation by the CEDAW Committee. One of the first expressions of such a change was General Recommendation No. 18 which recognised 'the situation of disabled women, who suffer from a double discrimination linked to their special living conditions.'⁶¹ This was followed up by General Recommendation No. 19 on violence against women which acknowledged that gender-based violence could afflict poor, unemployed and rural women, and young girls differently.⁶² The focus on poverty and rural women continued in General Recommendation No. 24 on women's right to health under Article 12 and General

⁵⁶ CEDAW, art 5(b).

⁵⁷ CEDAW, arts 7, 11(2), 16(1).

⁵⁸ CEDAW, art 14(1).

⁵⁹ Dianne Otto, 'Women's Rights' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (OUP 2010) 345, 354-55; Darren Rosenblum, 'Unisex CEDAW or What's Wrong with Women's Rights' (2012) 20 Columbia Journal of Law and Gender 98, 193.

⁶⁰ See in particular this discussion in relation to gender-based violence Shreya Atrey, 'Lifting as We Climb: Recognising Intersectional Gender Violence in Law' (2015) 5 Onati Socio-Legal Series 1512.

⁶¹ CEDAW Committee, General Recommendation No. 18 on Disabled Women, 10th Session (1991) pmb.

⁶² CEDAW Committee, General Recommendation No. 19 on Violence against Women, 11th Session (1992) [14] [15] [21].

Recommendation No. 26 on women migrant workers.⁶³ A more precise statement appeared in General Recommendation No. 27 which proclaimed that:

The discrimination experienced by older women is often multidimensional, with the age factor compounding other forms of discrimination based on gender, ethnic origin, disability, poverty levels, sexual orientation and gender identity, migrant status, marital and family status, literacy and other grounds. Older women who are members of minority, ethnic or indigenous groups, internally displaced or stateless often experience a disproportionate degree of discrimination.⁶⁴

But it was only in 2010, when intersectionality was embraced unambiguously in universal terms, through a seminal statement in General Recommendation No. 28 declaring that:

Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them.⁶⁵

Succeeding General Recommendations have followed suit in making intersectionality central to women's equality and enjoyment of human rights.⁶⁶ The most visible impact of this has been on individual decisions under the Optional Protocol. Whilst early communications decided by the CEDAW Committee stuck to a sex or gender-only analysis, the jurisprudence in the last ten years has shown acute awareness of using intersectionality for understanding causally on what basis women suffer violations of their rights, especially when that basis is compounded by race, disability, poverty etc, in addition to gender.⁶⁷ *Alyne da Silva Pimentel Teixeira (deceased) v Brazil*,⁶⁸ *Kell v Canada*,⁶⁹ *RPB v Philippines*,⁷⁰ and *MW v Denmark*⁷¹ are prominent examples of this. *Alyne* concerned the case of a socio-economically disadvantaged woman of Afro-Brazilian descent who lost her life in the absence of appropriate medical treatment during pregnancy and emergency obstetric care. In a first, the Committee found the State Party to be accountable for intersectional discrimination, having violated the rights to life, health, and non-discrimination under CEDAW not only on the basis of the deceased's gender but gender, race, and socio-economic background combined:

The Committee notes the author's claim that Ms. da Silva Pimentel Teixeira suffered from multiple discrimination, being a woman of African descent and on the basis of her socio-economic background...The State party also acknowledged that the convergence or association of the different elements described by the author may have contributed to the

⁶³ CEDAW Committee, General Recommendation No. 24 on Women and Health, 20th Session (1999) [7] [25] [28]; CEDAW Committee, General Recommendation No. 26 on Women Migrant Workers, 32nd Session (2008) [6] [7] [8] [14].

⁶⁴ CEDAW Committee, General Recommendation No. 27 on Older Women and Protection of their Human Rights, 42nd Session (2010) [13].

⁶⁵ CEDAW Committee, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2, 47th Session (2010) [18].

⁶⁶ CEDAW Committee, General Recommendation No. 34 on Rights of Rural women, 56th Session (2016) [14] [15]; CEDAW Committee, General Recommendation No. 35 on Gender-based Violence against Women, Updating General Recommendation No. 19, 68th Session (2017) [12] [23] [28] [37b] [41] [43] [48] [49] [50].

⁶⁷ See esp for an account of missed opportunities, Atrey (n 60) 1520-125.

⁶⁸ Communication No. 17/2008 (views adopted on 25 July 2011).

⁶⁹ Communication No. 19/2008 (views adopted on 28 February 2012).

⁷⁰ Communication No. 34/2011 (views adopted on 21 February 2014).

⁷¹ Communication No. 46/2012 (views adopted on 22 February 2016).

failure to provide necessary and emergency care to her daughter, resulting in her death. In such circumstances, the Committee concludes that Ms. da Silva Pimentel Teixeira was discriminated against, not only on the basis of her sex, but also on the basis of her status as a woman of African descent and her socio-economic background.⁷²

In the same vein, both *Kell* and *RPB* show the Committee's awareness of intersectionality in cases of gender-based violence. In *Kell*, the Committee found that the author had suffered an 'act of intersectional discrimination' since 'she was an aboriginal woman victim of domestic violence...and that such violence had the effect of impairing the exercise of her property rights'.⁷³ This finding led the Committee to recommend specific provisions of relief in relation to aboriginal women who suffered from distinct patterns of gender-based violence and discrimination in property rights.⁷⁴ Similarly, in *RPB*, the Committee examined judicial reliance on stereotypes about rape scenarios not only in relation to gender myths but also in relation to the victim's young age and disability as a deaf-mute girl. It thus specifically mandated the State Party to: '[e]nsure that all criminal proceedings involving rape and other sexual offences are conducted in an impartial and fair manner and free from prejudices or stereotypical notions regarding the victim's gender, age and disability.'⁷⁵ In the recent claim of *MW v Denmark*, the Committee made similar observations in the case of a foreign mother who had experienced severe difficulty and discrimination in approaching the Danish authorities for the release of her son impounded abroad. The Committee held that: 'discrimination against women on the basis of sex and gender is inextricably linked with other factors that affect women, such as nationality, and that States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned, and prohibit them.'⁷⁶

The upshot of this interpretive development of reading in intersectionality as part of CEDAW has been to enlarge the scope of protection from discrimination in the enjoyment of human rights to women who are intersectionally disadvantaged. This is possible only when the Committee is causally aware of the specific patterns of discrimination which afflict such women. Since these patterns are both similar to and also different from women who are only singularly disadvantaged and also other men, their specificity is required not only for the Committee's diagnostic role of understanding and addressing intersectional discrimination as such; but also for activists, claimants, and their lawyers to formulate demands and claims in ways which are both true to the diversity of women's lived experiences and also capable of representing and achieving women's goals.

These achievements are no mean feat. They have come after a long fight for the recognition of intersectionality and the need for speaking to and uplifting women who were intersectionally disadvantaged in accessing their human rights.⁷⁷ CEDAW

⁷² *Alyne* (n 68) [7.7].

⁷³ *Kell* (n 69) [10.2].

⁷⁴ *ibid* [10.3].

⁷⁵ *RPB* (n 70) [9(b)(iii)].

⁷⁶ *MW v Denmark* (n 71) [5.8].

⁷⁷ See Johanna Bond, 'Intersecting Identities and Human Rights: The Example of Romani Women's Reproductive Rights' (2004) 5 *Georgetown Journal of Gender and the Law* 897; Johanna Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations' (2003) 52 *Emory Law Journal* 71; Penelope E Andrews, 'Globalization, Human Rights and Critical Race Feminism: Voices from the Margins' (2000) 3 *Journal of Gender Race and Justice* 373; Hope Lewis, 'Global Intersections: Critical Race Feminist Human Rights and Inter/National Black Women' (1998) 50 *Maine Law Review* 309; Radhika Coomaraswamy, 'To Bellow Like a Cow: Women, Ethnicity, and the Discourse of Rights' in Rebecca J Cook (ed), *Human Rights of Women: National and International Perspectives* (1994).

jurisprudence has slowly but surely opened up to intersectional discrimination through its General Recommendations, decisions under the Optional Protocol, and even the country reporting process as we see below in section 4. CEDAW has thus finally come to provide, as Frances Raday argues, ‘the basis for transformative equality...tak[ing] into account a wide range of intersectional needs.’⁷⁸ In this way, the recognition of multiple and specific forms of women’s discrimination and violation of their human rights has been significant in the sense of relating to and representing women who suffer from intersectional discrimination, and also rectifying the structures which cause the same. The seeds for this intersectional transformation were in the text itself. In particular, this transformative vision of CEDAW is embraced in Article 5(a) which mandates State Parties: ‘to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.’ General Recommendation No. 25 further endorsed this transformative aim in specifying that:

the position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed. The lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.⁷⁹

The recent developments embracing intersectionality capitalise on these transformative possibilities of going beyond a mere anti-disadvantage or anti-stereotyping approach to reimagining a radical overhaul of a society such that ‘those features of existing cultures, religions or traditions and of legal, social and economic structures that obstruct the equality and human dignity of women are subjected to fundamental change.’⁸⁰

The answer to Nussbaum’s ‘prior question whether the document itself, and related documents, are good’ is still evolving in relation to intersectionality and its transformative vision. Whilst intersectionality remained a glaring gap in the early years of CEDAW jurisprudence, it is clear that intersectionality has been able to expand its foothold gradually. However, Nussbaum’s analysis of women’s progress and women’s human rights as enabled by CEDAW, misses this development. It presents a view of successes and failures which speak to only a cross-section of women at a time, and leaves intact broader patterns of gender discrimination which are connected to, but not solely determined by, gender. The case of Dalit women is particularly poignant in this regard. The next two sections subject claims of successes and failures of CEDAW to an intersectional perspective in the context of Dalit women and the Dalit feminist movement.

3. Intersectionality and the Enforcement of CEDAW

Direct enforcement of international law is a complicated terrain where, for example, the impact of CEDAW though purportedly progressive may not be ultimately

⁷⁸ Frances Raday, ‘Gender and Democratic Citizenship: The Impact of CEDAW’ (2012) 10 *International Journal of Constitutional Law* 512, 529.

⁷⁹ CEDAW Committee, General Recommendation No. 25 on temporary special measures, 30th Session (2004) [6] [7] [10].

⁸⁰ Rikki Holtmaat, ‘The CEDAW: A Holistic Approach to Women’s Equality and Freedom’ in Anne Hellum and Henriette Sinding Aasen (eds), *Women’s Human Rights: CEDAW in International, Regional, and National Law* (CUP 2013) 111.

transformative. The assessment of what is transformative and hence in line with the goals and purposes of CEDAW may have to be intersectional in order to ensure that CEDAW is used in ways which do not marginalise intersectional groups of women. Dalit women's tryst with CEDAW though shows that this may readily be the case. This part takes the example of violence against Dalit women to make the point about the continued marginalisation of Dalit women's intersectional position in the way CEDAW is enforced. Section 3.1 exemplifies this point by critiquing the silencing of the Dalit feminist voice in *Vishaka*—Nussbaum's example of the most assured success of the direct enforcement of CEDAW. Section 3.2 takes a more holistic view of the direct enforcement of CEDAW by the Indian Supreme Court to examine the myriad other ways in which CEDAW has been invoked and to conclude that its use has been highly variable for intersectional groups.

3.1 A Dalit Feminist Critique of *Vishaka*

Bhanwari Devi is a Dalit woman. She works as a government volunteer for the State of Rajasthan in India where her job is to campaign against the outlawed but still prevalent social evils like female foeticide, infanticide, and dowry. In 1992, Bhanwari Devi passionately took up the cause against child marriage. She worked tirelessly to educate her fellow villagers and prevent child marriages in her State which remains a prolific site for them even today. Bhanwari came to know of the wedding of a nine-month old daughter of a Gurjar (upper-caste) family and tried preventing it with the help of local authorities. The Gurjars were influential and were evidently offended. On 22 September 1992, a group of five Gurjar men approached Bhanwari and her husband who were working in their fields and started beating up her husband with sticks. When Bhanwari tried to intervene two men pinned her down and the other three took turns raping her. Bhanwari decided to report her rape. Her complaint was disbelieved by the police, the investigation was botched up and her case went up before a judge who, in 1995, three years after the incident, let all the accused go scot-free. His reason for acquittal being that, upper-caste men could not possibly have raped a Dalit woman. The judgment sent shock waves throughout the country leading to widespread collective protests and marches. It was then, that the Rajasthan-based NGO, Vishaka, amongst others, decided to file a writ petition at the Supreme Court of India to make workplaces safer for women. On 13 August 1997, the Court delivered its decision in the case of *Vishaka v State of Rajasthan*.⁸¹ The decision was groundbreaking because, in the absence of domestic legislation on the subject, the Court relied on international obligations assumed by India, especially under CEDAW and the Beijing Statement of Principles of the Independence of the Judiciary concluded in 1995, to promulgate extensive guidelines on the protection of women from sexual harassment in the workplace. The Court held that:

The meaning and content of the fundamental rights guaranteed in the Constitution of India [under Articles 14, 15, 19 and 21] are of sufficient amplitude to compass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of Judiciary forms a part of our constitutional scheme. *The international conventions and norms*

⁸¹ *Vishaka* (n 8).

*are to be read into them in the absence of enacted domestic law occupying the fields when there is no inconsistency between them.*⁸²

Bhanwari Devi became the catalyst for one of the most significant developments in women's human rights in the country, that too brought about by the judiciary not the legislature, all with the help of international law adopted in CEDAW. Though neither the judgment nor the commentary following it make much of the violation of her human rights or human rights of Dalit women which continue to be violated in specific and routine ways. The Supreme Court opened and dispensed with the immediate context which gave rise to the writ petition by proclaiming that:

The immediate cause for the filing of this writ petition is an incident of alleged brutal gang rape of social worker in a village of Rajasthan. That incident is the subject matter of a separate criminal action and *no further mention of it, by us, is necessary*. The incident reveals the hazards to which a working woman may be exposed and the depravity to which sexual harassment can degenerate ...⁸³

Nussbaum follows suit in describing the writ petition as occasioned by 'an alleged brutal gang rape of a social worker in a village in Rajasthan.'⁸⁴ Nussbaum then notes in parenthesis that 'This case was the subject of a separate criminal action, and it played no further role in the petition.'⁸⁵ Deemed covered by the 'separate criminal action', Bhanwari Devi was systematically erased from the story of *Vishaka* which continues to be told with aplomb by courts and commentators alike as the leading example of the invocation of CEDAW for enforcing women's human rights domestically.⁸⁶ Except, Bhanwari is 56 today, and twenty-five years after she was gang-raped, still waiting for justice to be served in the 'separate criminal action' pending before the Rajasthan High Court.⁸⁷ The interminably delayed justice in her case is reason enough to pause and contemplate about progress made without justice for the actual victim. But *Vishaka's* record must be set straight on several other counts. First, the case which occasioned the writ petition was one of sexual assault not sexual harassment. Cynthia Stephen reminds us of the difference this difference makes in her seething words:

There is plenty of money and media coverage for campaigns for redress to urban educated girls who face violence at the workplace, but nothing, almost, for justice to victims of caste-based atrocities faced by Dalit women, when they are raped when working in the fields, but both kinds of violence are lumped together under the term Violence against Women. I feel that there is little willingness among feminists to acknowledge the reality that violence faced by the middleclass woman is nothing compared with the level and scale of structural violence that rural Dalits women – the majority – face.⁸⁸

The mischaracterisation or recharacterisation of an incident of gang rape as sexual harassment at work for the purposes of the writ petition, devalues Dalit women's experience of sexual violence as merely an occasion for legal reform for

⁸² *ibid* (emphasis supplied).

⁸³ *ibid*.

⁸⁴ Nussbaum (n 4) 612.

⁸⁵ *ibid*.

⁸⁶ Catharine A MacKinnon, 'Sex Equality Under the Constitution of India: Problems, Prospects, and "Personal Laws"' (2006) 4 *International Journal of Constitutional Law* 181, 189; Kalpana Kannabiran, *Tools of Justice* (Routledge 2012) 25-27, 365, 367; P Ishwara Bhat, 'Constitutional Feminism: An Overview' (2001) 2 *Supreme Court Cases (Jour)* 1, 2.

⁸⁷ Geeta Pandey, 'Bhanwari Devi: The Rape that Led to India's Sexual Harassment Law' (17 March 2017) <<http://www.bbc.com/news/world-asia-india-39265653>> (accessed 12 October 2017); Shivam Vij, 'A Mighty Heart', *Tehelka Magazine* (13 Oct 2007).

⁸⁸ Cynthia Stephen, 'Feminism and Dalit Women in India' <<http://www.countercurrents.org/stephen161109.htm>> (accessed 13 December 2016).

other women to suit purposes which relate to them first, and to Dalit women after.⁸⁹ Dalit women's sexual assault becomes marginal, relevant only to the extent that it coincides with the demands and desires of upper-caste women. As a result, *Vishaka* engaged little with the reality of sexual violence against Dalit women which takes specific forms. Being both outcastes and women, Dalit women not only suffer from casteism and untouchability in the form of public exclusion and segregation just as Dalit men, but also suffer from patriarchy just as upper-caste women.⁹⁰ But their experience of casteism and patriarchy differs from both Dalit men and upper-caste women in that Dalit women suffer some unique forms of exploitation.⁹¹ Thus, for example, in addition to suffering from caste-based violence and rape, Dalit women are subjected to violence which is unique to them: stripping, naked parading, pulling out of hair and nails, sexual slavery, and bondage.⁹² Even typically gender-based crimes like rape, molestation, immoral trafficking, and prostitution take a different form when committed against Dalit women.⁹³ The difference lies in the very public nature in which Dalit women are targeted, their violations never hidden or obscured, but meant to provide a spectacle and be taken a lesson from.⁹⁴ All sides are supposed to be privy to their violations—upper-caste women are meant to view it with a sense of distance, as violence meted out to those unlike them and thus reminding them of their higher status as upper-caste; Dalit men are meant to view it with shame and regret, being punished vicariously for their transgressions; upper-caste men as perpetrators, who deem it their right, and in fact their duty, to impart these lessons through the bodies of Dalit women; and the police and the justice delivery system view it with a sense of disbelief and incredulity, deeming upper-caste men as incapable of assaulting Dalit women at all, and thus imparting impunity as justice.⁹⁵

Bhanwari Devi's case was thus paradigmatic of the kind of violence meted out to Dalit women which is public in nature—taking the form of sexual violence against Dalit women whose bodies are considered open to exploitation by upper-caste men but still carrying the burden of Dalit pride; meant for protecting the honour of the upper-caste, especially upper-caste women (girls) who must marry per caste norms

⁸⁹ Report, National Tribunal Violence against Dalit Women in India (30th September and 1st October, 2013) 6-7.

⁹⁰ Sharmila Rege, "'Real Feminism' and Dalit Women: Scripts of Denial and Accusation' (2000) 35 Economic and Political Weekly 492; Sharmila Rege, 'Dalit Women Talk Differently: A Critique of "Difference" and Towards a Dalit Feminist Standpoint Position' (1998) 33 Economic and Political Weekly 39.

⁹¹ Gopal Guru, 'Dalit Women Talk Differently' (1995) 30 Economic and Political Weekly 2548.

⁹² National Tribunal Report (n 989) 2.

⁹³ Laxmi Murthy and Rajashri Dasgupta, *Our Pictures, Our Words: A Visual Journey through the Women's Movement* (Zubaan 2011) 35-36 ('The use of rape as a tool to force submission is rife in areas where struggles for self-determination are ongoing. It is also used to subdue those who have dared to challenge their suppression, be it Dalits, Adivasis, or the poor').

⁹⁴ This difference is too often undermined. As Nussbaum writes elsewhere, 'it is particularly common for women whose caste status [as upper-caste women] makes it shameful for them to seek employment outside the home. Upper-caste women...are often worse off than lower-caste women, who can circulate freely.' Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press 2011) 9. Public forms of sexual abuse and humiliation are a high price to pay for circulating 'freely'. Employment options which Dalit women access 'freely' like manual scavenging and *devdasi* system (a system of dedicating Dalit women to temples as a religiously legitimised form of sexual exploitation and abuse by upper-caste men), are also far from what Nussbaum would admit as emancipatory within the capabilities approach.

⁹⁵ See Anupama Rao, *The Caste Question* (University of California Press 2009) ch 6, where Rao provides a thoroughgoing account of the public nature of violence suffered by Dalit women through the example of the legal rendering of the *Sirasgaon* incident.

(such as child marriage); serving as reprisal for the transgressions of Dalits in challenging these caste norms (like Bhanwari); witnessed by Dalit men who are meant to learn a lesson from the violation of their women's bodies (Bhanwari's husband); and characterised by full impunity for the upper-caste men responsible for it (the Gurjar men).

Second, as a result, the entire legal discourse on *Vishaka* missed the fact that Bhanwari Devi suffered sexual violence which was inherently intersectional in nature. The reason for the violence to have taken the form of gang rape *was* caste.⁹⁶ Bhanwari was targeted not simply because she is a woman but particularly because she is a Dalit woman.⁹⁷ This fact played no role in crafting the response to women's issues of gender justice to speak to women who were targeted because of their caste.⁹⁸ Neither the text of the judgment nor, what Nussbaum calls, 'admirably clear and comprehensive set of guidelines'⁹⁹ mention caste as what *dictates* violations of women's human rights in addition to gender. Here, the Court was directly borrowing from Article 11 of CEDAW on the right to employment, which had been interpreted in General Recommendation No. 19 on violence against women as including the right against sexual assault and sexual harassment. *Vishaka* adopted the definition of sexual harassment proposed in paragraph 18 of General Recommendation No. 19 which was defined exclusively in terms of women's sex or gender. In fact nowhere did General Recommendation No. 19 mention that sexual violence against women could be motivated not only by women's sex or gender but also by their race, class, caste, religion, sexual orientation, disability, age, marital status etc. In 1997, the CEDAW Committee was still thirteen years from recognising intersectionality, and twenty years from proclaiming that 'because women experience varying and intersecting forms of discrimination, which have an aggravating negative impact, the Committee acknowledges that gender-based violence may affect some women to different degrees, or in different ways.'¹⁰⁰ The continued sidelining of intersectionality in discussing *Vishaka* today though is as perplexing as flawed, given these developments and those recounted in section 3.3 above.

Third, the erasure of the intersectional perspective also left the casteist reasoning of the lower court's judgment unchallenged—which was the reason why Bhanwari's case was brought to light at all. To remind, the decision which is pending appeal was one which had found that:

Indian culture has not fallen to such low depths that someone who is brought up in it, an innocent, rustic man, will turn into a man of evil conduct who disregards caste and age differences — and becomes animal enough to [assault] a woman.¹⁰¹

The judge below had not only relied on caste difference as conclusive of the fact that no rape could have ever occurred but through this propagated the culture of

⁹⁶ Guru (n 91) 2548 ('The question of rape cannot be grasped merely in terms of class, criminality, or as a psychological aberration or an illustration of the male violence. The caste factor also has to be taken into account which makes sexual violence against dalit or tribal women much more severe in terms of intensity and magnitude').

⁹⁷ Mangala Subramaniam and Preethi Krishnan Ramaswamy, 'Gender, Caste, and Class: Structural Violence in India' in Shirley A Jackson, *Routledge International Handbook of Race, Class, and Gender* (Routledge 2015) 240 ('In the Indian context, caste and gender are systems of oppression experienced simultaneously by women').

⁹⁸ Similarly, in case of Black women, Angela Harris explains the qualitatively distinct nature of rape as 'a far more complex experience, and an experience as deeply rooted in color as in gender.' Angela P Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 Stanford Law Review 581, 598.

⁹⁹ Nussbaum (n 4) 615.

¹⁰⁰ General Recommendation No. 35 (n 66) [12].

¹⁰¹ Kannabiran (n 86) 398.

impunity for upper-caste men responsible for the crime. Similar casteist reasoning was left unchallenged in the case of custodial rape of Mathura, a sixteen-year old tribal girl, which Nussbaum cites as another case which did not deliver justice for the victim, but did ‘however, energize the women’s movement and the academic community to demand legal change’.¹⁰² The criminal law amendments which followed in 1983 were radical for their time, in that they declared it an offence to reveal the identity of rape victims, shifted the burden of proof to be on the accused when the victim claims that she did not consent; and, deleted the provision referring to the character of the prosecutrix in rape cases. But they did not touch upon caste, the reason for which Mathura was gang-raped in police custody and her complaint was mishandled and eventually disbelieved.¹⁰³ The gains for the women’s movement centered around two of the biggest cases in India, of Mathura and Bhanwari Devi, thus seem partial and accruing only to upper-caste middle-class women. As Rege concludes: ‘From Mathura to Bhanwari, the Indian women’s movement had addressed the issues and cases of women of dalit, tribal and minority communities, but it is one thing to address their issues and another to revision politics to centre around the issues of the most marginalised of women.’¹⁰⁴ In using CEDAW to homogenise claims of Dalit women as claims of gender discrimination alone rather than recentering gender discrimination around caste and other structures of disadvantage, the Indian Supreme Court seems to have narrowed the transformative scope of the treaty which speaks to the condition of all women in fact.

Lastly, and for all these reasons it matters for the record to be set straight, because *Vishaka* has been the hallmark of resounding success of direct application of CEDAW, not only for Nussbaum but for countless others.¹⁰⁵ The institutional failure to address caste as a gender issue is appropriated as evidence of institutional success of CEDAW.¹⁰⁶ But in fact the obliteration of caste stories of Mathura, Bhanwari Devi, and Dalit women from the story of the women’s movement and CEDAW perpetuates the interminable cycle of disadvantage experienced by women of caste. In dubbing their stories as success stories, we may be contributing to their interminable cycle of disadvantage. Nussbaum argues that after sixteen years of *Vishaka*, the legislation which followed in the form of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013, ‘is extremely closely modeled on *Vishaka*, hence, in part, on the Recommendations of the CEDAW Committee, so we can say that CEDAW had a major effect, though several steps removed... At least we may conclude that CEDAW, and especially the CEDAW Committee, made a difference to the law—when a domestic legislature had already ratified the pertinent documents.’¹⁰⁷ There is no doubt about this. India got a set of Guidelines and a new

¹⁰² *Tukaram v State of Maharashtra* 1979 AIR 185 (Supreme Court of India); Nussbaum (n 4) 619.

¹⁰³ Murthy and Dasgupta (n 93) 35-36 (‘women like Mathura...faced violence as well as judicial prejudices not only because of their gender, but also because they belonged to particular religion and caste, and because they were poor. The use of rape as a tool to force submission is rife in areas where struggles for self-determination are ongoing. It is also used to subdue those who have dared to challenge their suppression, be it Dalits, Adivasis, or the poor’).

¹⁰⁴ Rege, ‘Real Feminisms’ (n 90) 493.

¹⁰⁵ See e.g. Zwingel (n 12) 193, Madhu Mehra, ‘India’s CEDAW Story’ in Hellum and Aasen (CUP 2013); Andrew Byrnes and Marsha Freeman, World Development Report, ‘The Impact of the CEDAW Convention: Paths To Equality’ (2011), Vedna Jivan and Christine Forster, ‘What Would Gandhi Say? Reconciling Universalism, Cultural Relativism and Feminism Through Women’s Use of CEDAW’ (2005) 9 Singapore Year Book of International Law 103.

¹⁰⁶ Adapted from Sara Ahmed, *Living a Feminist Life* (Duke University Press 2017) 111.

¹⁰⁷ Nussbaum (n 4) 616.

law eventually on sexual harassment because of CEDAW. But given the serious oversights of *Vishaka* in ignoring all elements of caste from what was, originally an intersectional problem of caste-based sexual assault, we can temper the conclusion about the ‘major effect’ of CEDAW in this case. In particular, two modifications to Nussbaum’s conclusion are in order. First, that the progress made was not intersectional in nature, in that even though *Vishaka* was no marginal success, it ended up marginalising exactly the one (Bhanwari Devi) and a million other Dalit women to whom the case belonged in reality. Second, the progress was thus also not transformative in nature in that it failed to understand and then overturn the complex patterns of intersectional gender violence which were public in nature and suffered specifically by those disadvantaged by gender, caste, and class at the same time.¹⁰⁸

In sum, *Vishaka* was so much more than what appears in the text of the judgment, the Guidelines and the commentary which followed in its praise. It was a case which rode at the back of a heinous atrocity against a Dalit woman but ended up dumping it by the wayside as it sanitised an incident of caste-based sexual assault into gender-based sexual harassment. *Vishaka* remains far from the ideals of complete justice and transformative progress in its failure to appreciate the intersectionality of its origins.

3.2 Beyond *Vishaka*

Vishaka though is not alone in invoking CEDAW for less than transformative results for women’s equality and human rights. CEDAW has been cited nearly twenty five times by the Supreme Court of India.¹⁰⁹ Beyond *Vishaka*, other landmark judgments show deep fissures in the invocation of CEDAW for supporting different versions of equality for different women’s groups. The decision in *State of Maharashtra v Indian Hotel and Restaurants Association*¹¹⁰ demonstrates this gap keenly. The case involved a constitutional challenge to the ban on ‘bar dancing’ in restaurants rated three stars and below in Maharashtra. The government believed that these establishments served as spots for illegal trafficking and prostitution in the garb of bar dancing. It thus justified the ban as being in consonance with CEDAW by preventing ‘the direct and indirect effect on the exploitation of women, and the resultant and causative violence

¹⁰⁸ It is though useful to note that some are more hopeful in that, for example, Kannabiran notes that: ‘The guidelines on the issue of sexual harassment in the *Visakha* case were framed from the standpoint of the situation of a working-class dalit woman’s vulnerability vis-à-vis the dominant castes, the police, and the state/government...The significance of this decision lies in the judicial recognition of the notion of ‘hostile environments’ as obstructing women’s equal entry into employment — a notion that could be extended by courts to understand better the subjugation of women in patriarchal societies divided along multiple, intersecting lines of caste, class, religion, and gender, among other axes, not severally but in conjunction with each other.’ Kannabiran (n 106) 367-368. As I have argued, the text of the judgment, the Guidelines and the eventual legislation do not reflect this position. There is little there in the legal discourse resulting from *Vishaka* which shows the epistemic understanding of Dalit women’s specific vulnerability and even though Guidelines were wide and open-ended the lack of specific mention and intersectional couching, it is hard to agree with Kannabiran off hand. Rather, there is evidence to the fact that intersectionality and the position of women disadvantaged in an intersectional way seems to have been systematically sidelined in constitutional interpretation in India. See Shreya Atrey, ‘Through the Looking Glass of Intersectionality: Making Sense of Indian Discrimination Jurisprudence under Article 15’ (2016) 16 Equal Rights Review 160.

¹⁰⁹ The High Courts and Lower Courts invocation of CEDAW is far more prodigious. The online portal for case law – Manupatra – alone returns over four hundred judgments which have cited CEDAW.

¹¹⁰ *State of Maharashtra v Indian Hotel and Restaurants Association* AIR 2013 SC 2582 (*Bar Dancers*).

against women'.¹¹¹ It is significant to note that this position was shared with Dalit feminists who, as Nivedita Menon describes, 'argued that such forms of "entertainment" [bar dancing] are not only patriarchal, but also casteist, since many Dalit women come from castes that are traditionally forced into such professions. Thus, the discomfort of Dalit feminists with sex work and professions seen to be related to prostitution (such as dancing for male audiences in bars), cannot be seen only in terms of conventional morality.'¹¹² In lifting the ban, the Court adopted a position which was diametrically opposite to this one. It found the ban to be unconstitutional because it violated the right to livelihood of over 75,000 bar dancers who were left jobless and without means to support themselves and their families.¹¹³ In preferring to see bar dancing as a neutral occupation/work or form of livelihood under the Constitution, the Supreme Court overlooked the casteist implications of bar dancing, where those who actually perform it are often lower-caste lower-class women who are forced into it as professions exclusively earmarked for them and organised to in turn exploit them.¹¹⁴ The *Bar Dancers* case is thus an inverse of *Vishaka* where the citation of CEDAW seems to support a position held by Dalit feminists for reading in the caste implications of gendered violations, though this reading was ultimately passed over for a position which was avowedly caste-neutral just as in *Vishaka*.

The pattern of the invocation of CEDAW is thus highly variegated—a sliding scale with direct enforcement of CEDAW on the one hand, the interpretation of CEDAW provisions for bolstering women's equality under the Constitution and various beneficial legislations in the middle, and the mere citation of CEDAW in judgments on the other. None of the strategies though, seem to automatically ensure progress which is transformative or that which takes into account the condition of intersectional groups of women like Dalit women, adivasi (tribal) women or Muslim women. Take for example the most recent invocation of CEDAW in the decision of *Shayara Bano v Union of India*¹¹⁵ which outlawed the practice of triple talaq (the pronouncement of divorce by a Muslim husband by saying 'talaq' [urdu for divorce] three times over) under Muslim personal law. Despite a progressive result, the reasoning or the route to declaring the practice of triple talaq unconstitutional was hardly based on a progressive reading of rights or equality. In fact the triple talaq is emblematic of the way CEDAW is invoked rhetorically rather than substantively. The

¹¹¹ *ibid* [45].

¹¹² Nivedita Menon, 'Is Feminism about "Women"? A Critical View on Intersectionality from India' (2015) 50 *Economic and Political Weekly* 37, 39 (although Menon eventually goes on to reject the relevance of intersectionality in the Indian feminist discourse which is then challenged by Mary E John in 'Intersectionality Rejection or Critical Dialogue?' (2015) 50 *Economic and Political Weekly* 72). It is also useful to note that there were Dalit women on both sides of the divide, some hoping to reclaim and redefine their gender and caste space of bar dancing as lower-caste women by opposing the ban. Sameena Dalwai, 'Dance Bar Ban: Doing a Feminist Legal Ethnography' (2016) 12 *Socio-Legal Review* 1.

¹¹³ *Bar Dancers* (n 110) [10], [31], [32].

¹¹⁴ Poulomi Pal, 'The India Women's Movement Today: The Challenges of Addressing Gender-based Violence' in Amrita Basu (ed), *Women's Movements in the Global Era: The Power of Local Feminisms* (2nd edn, Westview Press 2017); FAOW (Forum Against Oppression of Women), 'Feminist Contributions from the Margins: Shifting Conceptions of Work and Performance of the Bar Dancers of Mumbai' (2010) 45 *Economic and Political Weekly* 48. The parallel with the *devdasi* system is inevitable. See Meena Gopal, 'Caste, Sexuality and Labour: The Troubled Connection' (2012) 60 *Current Sociology* 222; Kalpana Kannabiran and Vasanth Kannabiran, *Muvallur Ramamirthammal's Web of Deceit: Devadasi Reform in Colonial India* (Kali for Women 2003).

¹¹⁵ Writ Petition (C) No. 118 of 2016, decided on 31 August 2017 (Supreme Court of India).

Court in *Shayara Bano* at para 74 reminds that India must adhere to applicable international law which includes the commitment to gender equality and goes to cite the relevant provisions from CEDAW.¹¹⁶ Yet, concerns of gender equality either within article 15(1) of the Constitution which prohibits sex and religion based discrimination or within CEDAW did not become the basis on which triple talaq was ultimately outlawed. Instead Justice Nariman (along with Justice Lalit) found that the practice was unconstitutional on the basis that it was arbitrary and hence violative of article 14 on the right to equality of the Constitution.¹¹⁷ For a decision touted to be one of the most significant victories for the rights of Muslim women in India, the *Shayara Bano* dicta appears to equate women's equality to simply a matter of non-arbitrariness. Needless to say, it creates a rather narrow platform for challenging deep seated structural discrimination faced by Muslim women based on their religion, gender, and class on an everyday basis.

This though has been a long held strategy where women's rights are given relief based on CEDAW but in a rather perfunctory and partial way or at least not on an equal basis with men as envisaged in CEDAW. One of the first decisions which cited CEDAW confirms this early trend. *Gita Hariharan v Reserve Bank of India*¹¹⁸ concerned the constitutional validity of a provision under Hindu law which declared the natural guardian of a Hindu minor to be 'the father, and after him, the mother'. The provision was challenged as against the principle of gender equality enshrined in article 14 and 15(1) of the Constitution. Writing for the Court, Banerjee J set out the correct interpretation of the term 'after' as not necessarily after the death of the father, but 'in the absence of', be it temporary or otherwise total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise.¹¹⁹ This he declared was the correct interpretation of the term constant with ideals of gender equality and justice enshrined in the Constitution and CEDAW.¹²⁰ The decision appears ironic—being based on equality and denying it all the same in that mothers are not treated on par with fathers as guardians of their children but merely as surrogates or fillers *in the absence of* fathers. The denial of dignity as a woman and rights as a mother, though not total, is certainly substantial.¹²¹

The decision in *Z v State of Bihar*¹²² is another example of the Supreme Court deciding the matter on other grounds but bolstering or justifying that decision in light of India's commitment to gender equality under CEDAW. In *Z v State of Bihar*, the Court ordered the state to provide compensation for the delay in terminating the pregnancy of a 'mentally retarded' (the phrase used in the judgment) woman who was raped and had consented to abort the foetus. The decision was taken under the Victims Compensation Scheme framed under section 357-A of the Code of Criminal Procedure. The Court simply parted by reminding itself of the reproductive rights of women guaranteed under the CEDAW to which India was a party.¹²³ CEDAW seems to have played no interpretative role in the Court's reasoning. In fact, mere citation of CEDAW as promoting women's equality and gender justice seems to be the most

¹¹⁶ *ibid.*

¹¹⁷ Joseph J who too found the practice unconstitutional, found it to be so on the basis that it was not part of Muslim personal law since it was not mandated under Koran. *ibid.*

¹¹⁸ AIR 1999 SC 1149.

¹¹⁹ *ibid* [18].

¹²⁰ *ibid* [22] [37] [45] [114].

¹²¹ MacKinnon (n 86) 191.

¹²² Civil Appeal No.10463 of 2017, decided on 17 August 2017.

¹²³ *ibid* [57].

common way in which CEDAW is invoked at all,¹²⁴ in addition to using CEDAW and its invocation in *Vishaka* for enforcing other international obligations.¹²⁵

Yet, there is a set of cases which has indeed used CEDAW in substantive and transformative ways – using it directly for overriding legislative provisions or policies which were against women’s equality and human rights. For example, in a single stroke, the Supreme Court made marriage registration compulsory citing CEDAW, despite the declaration under CEDAW which cited the impracticalness of enforcing compulsory marriage registration ‘in a vast country like India with its variety of customs, religions and level of literacy.’¹²⁶ In another seminal example, CEDAW’s article 11 was used to extend maternity leave under the Maternity Benefit Act 1961 to part time workers and wage labourers.¹²⁷ While maternity leave was granted to regularised female workers at the Municipal Corporation of Delhi, those who were on the muster roll were excluded. The Court cited a slew of enabling constitutional provisions and provisions under the Maternity Benefit Act 1961 but ultimately quoted in full article 11 of CEDAW on the elimination of discrimination against women in the field of employment and establishing their right to work. It went on to hold and conclude that: ‘These principles which are contained in Article 11...have to be read into the contract of service between Municipal Corporation of Delhi and the women employees (muster roll); and so read these employees immediately become entitled to all the benefits conceived under the Maternity Benefit Act, 1961... the benefits under the Act shall be provided to the women (muster roll) employees of the Corporation who have been working with them on daily wages.’¹²⁸ In *Charu Khurana v Union of India* the Supreme Court broadly relied on gender equality enshrined in CEDAW to declare it unlawful for private make-up artists associations working in the cinema industry to be denying membership to female make up artists on the basis of their sex.¹²⁹ The Supreme Court has even invoked CEDAW Committee’s decision in *AS v*

¹²⁴ Citing CEDAW as having been given effect to through the Domestic Violence Act 2005: *Kunapareddy alias Nookala Shanka Balaji v Kunapareddy Swarna Kumari* (2016) 11 SCC 774 [12]; *Vaishali Abhimanyu Joshi v Nanasaheb Gopal Joshi* Civil Appeal No. 6448 of 2017 (Arising out of SLP (C) No. 24045 of 2016) [17]; *Hiral P Harsora v Kusum Narottamdas Harsora* (2016) 10 SCC 165 [17]). Citing CEDAW for setting of scene in progressive decisions or reminding the Court of the international obligations to be adhered to: *Madhu Kishwar v State of Bihar* AIR 1996 5 SCC 125; *C Masilamani Mudaliar v The Idol of Sri Swaminathaswami Swaminathaswami Thirukoli* (1996) 8 SCC 525; *Mrs. Valsamma Paul v Cochin University*, Civil Appeals Nos. AIR 1996 SC 1011. Somewhat obliquely, CEDAW’s reference in another case is mentioned: *Gaddam Ramakrishnareddy v Gaddam Rami Reddy* (2010) 9 SCC 602 [11]; *Anuj Garg v Hotel Association of India* (2008) 3 SCC 1. CEDAW has also been referred to in the footnotes for general propositions reaffirming women’s equality and gender justice: *Krishna Veni Nagam v Harish Nagam*, Transfer Petition (Civil) No. 1912 of 2014 (under Section 25 of the Civil Procedure Code, 1908), decided on 9 March 2017.

¹²⁵ CEDAW and *Vishaka* have both been cited outside of sex equality context for persuading the Court to giving force to other international obligations like in environmental law (*Gulf Goans Hotels Company Ltd. vs. Union of India* (2014) 10 SCC 673 [8]). But more directly, *Vishaka*, and more circuitously CEDAW, have been used to strengthen the argument that India must follow and implement international obligations it has assumed such as in the context of trans rights (*NALSA v Union of India Writ Petition* (2014) 5 SCC 438).

¹²⁶ *Seema v Ashwani Kumar* AIR 2006 SC 1158.

¹²⁷ *Municipal Corporation of Delhi v Female Workers (Muster Roll)* AIR 2000 SC 1274.

¹²⁸ *ibid* [35].

¹²⁹ 2014 SCC Online SC 900 [7] [50]. The reasoning though has been found faulty on the basis that the organisation was a private one and the Court did not confront but simply bypassed the question of whether private organisations could in fact be held liable for discrimination under the Constitution where fundamental rights are largely (if not only) enforceable against the State per article 12. Gautam Bhatia, ‘The Supreme Court’s Make-Up Artists Decision and its Discontents’ Indian Constitutional

Hungary to support the reproductive rights of women and in particular for framing specific guidelines for informed consent in cases of sterilisation which did not previously exist.¹³⁰ CEDAW has also been relied on in contexts like rehabilitation of children of prostitutes and child prostitutes¹³¹ for framing powerful orders directing the government to issue appropriate laws and guidelines or to implement them as a matter of international obligations assumed in CEDAW. Needless to say, CEDAW has been invoked to uphold punishments for sexual harassment – a crime created solely by relying on CEDAW in *Vishaka*.¹³²

The thread running through this set of cases which invoked CEDAW for clearly transformative results seems to be that CEDAW has been substantially relevant in filling legal gaps in situations which have been previously unregulated or sparsely regulated. In fact, the Supreme Court has not overstepped its limits in cases where clear laws exist and an improvement could only be brought about by the Parliament. In such cases, the Supreme Court has used CEDAW to urge the Parliament to strengthen laws, say in the case of increasing punishment for child sexual abuse under section 376 of the Indian Penal Code¹³³ or for evaluating the monetary value of women's housework for the purposes of compensation for a women's relative under the Motor Vehicles Act 1988, when the deceased women had no source of income.¹³⁴

Thus, the Indian Supreme Court's record of enforcing CEDAW presents variable results—giving some indication that CEDAW can be used in a robust manner to improve women's condition but often showing a rather insubstantial or weak use of CEDAW. Two observations are in order. First, that studying the enforcement of CEDAW in domestic jurisdictions needs to be a more thoroughgoing exercise which picks on not just seemingly exemplary cases like *Vishaka* but a whole spectrum of cases which show the many ways in which international instruments are invoked in specific contexts like India—for mere citation, interpretation or direct application. Second, that the impact of these decisions and the ways in which CEDAW is enforced must be traced not only along gender lines but also, depending on context, in relation to intersectional groups affected. It is because what counts as progress for one set of women may not qualify as such for another. As seen through the example of Dalit women, this becomes especially problematic when those on the losing end are those who are intersectionally disadvantaged.

4. Intersectionality, CEDAW and the Women's Movement

CEDAW works with many limitations at hand. It is an international treaty and is not per se directly enforceable. The bulk of the CEDAW Committee's work in the form of the reporting process under Part V of the Convention 'has no real teeth'.¹³⁵ Even in the case of the Optional Protocol which establishes an individual complainants procedure, many countries have not ratified the Protocol, and where they have, the

Law and Philosophy Blog (23 November 2014) <<https://indconlawphil.wordpress.com/2014/11/23/the-supreme-courts-make-up-artists-decision-and-its-discontents/>> (accessed 12 October 2017).

¹³⁰ *Devika Biswas v Union of India* Writ Petition AIR 2016 SC 4405 [86] [88].

¹³¹ *Gaurav Jain v Union of India* AIR 1997 SC 3021.

¹³² *Apparel Export Promotion Council v AK Chopra* AIR 1999 SC 625 [28].

¹³³ *Supreme Court Women Lawyers Association (SCWLA) v Union of India*, Writ Petition (Civil) No. 4 of 2016 (Under Article 32 of the Constitution of India), decided on 11 January 2016; *Sakshi v Union of India* AIR 2004 SC 3566.

¹³⁴ *Arun Kumar Agrawal v National Insurance Company* (2010) 9 SCC 218 [14] [15].

¹³⁵ Nussbaum (n 4) 604.

Committee has been too deferential to national courts.¹³⁶ General Recommendations though, as Nussbaum agrees, have gradually improved and have made significant contributions such as in the case of gender-based violence.¹³⁷ The impact of CEDAW may then be more layered than imagined. This section explores how CEDAW has overcome its limitations in some ways and translated them into possibilities of greater intervention in targeted spaces. Section 4.1 shows that inspite of losing out on formal legal battles on an international and domestic plane, Dalit women have been able to raise consciousness by participating in the women's movement transnationally. The success of the transnational women's movement and CEDAW is thus defined not only in terms of building solidarity over commonalities but also crucially over accommodation of differences. Section 4.2 looks at some of the specific cases like abortion, contraception and sexual orientation which Nussbaum mentions as CEDAW's glaring failures, and finds that CEDAW's influence, once again, is more fine-grained than imagined.

4.1 Dalit Women's Movement and CEDAW

The fervent campaigning after the gang rapes of Mathura and Bhanwari Devi remains the hallmark of contemporary women's movement in India. But in framing Dalit women's sexual violence as a matter of gender alone, the mainstream feminist movement flattened out the complexity of their violations. Thus, Rege remarks on the handling of Mathura's case:

While the [National Federation of Indian Women] looked at rape in 'class' terms, the socialist women talked in terms of the 'glass vessel cracking' and therefore in terms of loss of honour, and the [All India Women's Conference] provided psychological explanations of the autonomous women's groups highlighting the use of patriarchal power. Looking back at the anti-rape agitation, it is apparent that the sexual assaults on dalit women...did not become a nodal point for such an agitation, in fact they come to be excluded. The campaign therefore became more of a single issue one.¹³⁸

Similarly, writing of Bhanwari Devi and the agitation around *Vishaka*, John reveals the contradictions in the position of the Indian state for supporting the women's cause but ultimately failing in 'implementing policies or laws in favour of a woman of a different class and caste, especially when it involves opposing those with whom the state identifies.'¹³⁹ She thus concludes that the Indian state 'overwhelmingly failed all but its privileged citizens', which in the case of the women's movement were the upper caste middle class women. The direct enforcement of CEDAW in *Vishaka* and legal intervention generally had left much to be desired from the women's movement and women's human rights by Dalit women.

Little has changed in terms of the orientation of the mainstream feminist movement in India and the government's attitude towards it.¹⁴⁰ Take for example the

¹³⁶ *ibid.*

¹³⁷ *ibid.*

¹³⁸ Rege, 'Dalit Women Talk Differently' (n 90) 92.

¹³⁹ Mary E John, 'Gender and Development in India, 1970s-1990s: Some Reflections on the Constitutive Role of Contexts' (1996) 31 *Economic and Political Weekly* 3071, 3075.

¹⁴⁰ This claim is much the opposite of what Nussbaum writes in respect of the Indian women's movement elsewhere: 'Though still all too evident in society in general, divisions along lines of caste and religion are anathema in the Indian women's movement.' Nussbaum, *Creating Capabilities* (n 113) 3. To some extent, it is true that divisions along caste and religious lines have been meaningfully bridged by feminists but that does little justice to understanding just how diverse and fractured the

national and global outrage against the gang-rape and murder of Jyoti Pandey in December 2012 in Delhi. The outrage found a commensurate response in the form of a Committee report prepared in record time, on the subject of: ‘possible amendments to the Criminal Law to provide for quicker trial and enhanced punishment for criminals committing sexual assault of extreme nature against women.’¹⁴¹ The Committee report is rife with concern for the position of women who face sexual violence not only as women but as women of caste, religion, culture, and region.¹⁴² The Report encourages the State to recognise in unequivocal terms that: ‘No woman shall be unfairly discriminated on grounds of gender including...discrimination by virtue of a woman belonging to another sub-sect of caste, religion, region or race.’¹⁴³ Yet, the changes in the Criminal Law (Amendment) Act 2013 inspired by the Report, do not reflect this position or see sexual violence as mediated by any other identity. In fact, despite the intervention in the progressive Justice Verma Committee Report, sexual violence against Dalit women continues unabated and unlamented, arousing little of the outrage shown towards sexual violence against upper-caste middle-class women. In 2014, Women against Sexual Violence and State Repression produced a report to ‘expose and understand the ongoing onslaught of sexual violence against dalit girls and women in the state of Haryana.’¹⁴⁴ The Report juxtaposes its findings against the movement for responding to sexual violence since the 2012 incident. It is worth quoting its observations in full:

In October 2012, dalit activists from media watch groups created a map of Haryana with the title ‘30 Days in a Rape State’ with locations and basic information on the rape of 19 Dalit girls that had been perpetrated in several districts during that month. This was followed by a list of 101 cases from across the country, gleaned from English newspapers and circulated on 30 August 2013. An updated version of this list was circulated two months later, with the number of cases at 180—an increase by 80 percent in just two months. The day that this updated list was published—16 December 2013—marked the first anniversary of the fatal gang rape in Delhi that shocked the nation and created ripples across the world. In sharp contrast to the anger and outrage over the Delhi tragedy, public and media reactions to the equally horrifying ordeals of Dalit girls and women have been muted. Their stories receive only a cursory mention in the media and are seldom followed up with any seriousness. The wider public has not shown any serious concern. Even women’s movements across the country have not been able to respond to this explosion of sexual violence in Haryana in any sustained manner.¹⁴⁵

The result has been a widespread disillusion with and alienation from the mainstream women’s movement. As Cynthia Stephen remarks in her scathing

women’s movement has been and that despite of avowed proclamations like the one made by Nussbaum, divisions are all too apparent between mainstream feminism on the one hand and Dalit feminism on the other. Recital of solidarity does nothing to abate the factions and difference in ideologies which are in fact present. See esp Gabrielle Dietrich, ‘Dalit Movements and Women’s Movements’ in *Reflections on the Women’s Movement: Religion, Ecology, Development* (Horizon India 1992).

¹⁴¹ JS Verma, Leela Seth, Gopal Subramaniam, ‘Report of the Committee on Amendments to Criminal Law’ (2013)

<<http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf>> (accessed 12 October 2017).

¹⁴² *ibid* 14-15, 38, 228-29, 225 (references to religion and region and caste culture). Also see references to disability and age at 39, 66, 420, 197, 223, 269, 270.

¹⁴³ *ibid* 431.

¹⁴⁴ Women Against Sexual Violence and State Repression, ‘Speak! The Truth is Still Alive: Land, Caste and Sexual Violence Against Dalit Girls and Women in Haryana’ (2014) <<http://www.indianet.nl/pdf/Speak.pdf>> (accessed 21 Aug 2017).

¹⁴⁵ *ibid* 2; Arun Khote, ‘Casting Rape: 101 Cases of Sexual Violence against Dalit Women that Failed to Generate Mainstream Outrage’ (2013) <<http://www.indiaresists.com/after-damini-101-brutal-atrocities-heinous-crime-against-dalit-women-india/>> (accessed 12 October 2017).

critique, the Indian women's movement has developed with 'little understanding of the economic, religious, political and ideological isolation of Dalit women'.¹⁴⁶ There remains a gap in relating to and understanding the nature of discrimination and violation of Dalit women's human rights, especially when it comes to the sexual violence.

Dalit women's movement and Dalit feminism emerged and has existed in this space of continued marginalisation. The National Federation of Dalit Women was formed in Delhi in 1995 by Ruth Manorama and continues to be a central space for Dalit women's organisation, in addition to, more recently established All India Dalit Mahila Adhikar Manch launched in 2014 and various other regional organisations.¹⁴⁷ The highlight of Dalit women's organisation though has been the possibility to canvass its issues not only in the domestic terrain, but through CEDAW, internationally.¹⁴⁸ Just as India ratified CEDAW in 1993, Dalit feminists started advocating for their causes through 'transnational activism'.¹⁴⁹ The internationalisation of the Dalit women's agenda was pursued vigorously at the UN World Conference on Women in Beijing (1995) and Durban (2001), First World Dalit Convention in Kuala Lumpur (1998), establishment of the International Dalit Solidarity Network in Copenhagen (2000), the Hague Declaration on the Human Rights and Dignity of Dalit Women (2006).¹⁵⁰ As Mahanta asks: 'The question that is crucial in this context, however, is why the need was felt by the Dalit women's movement in India to align itself with international forums for the furtherance of its domestic struggle.'¹⁵¹ Part of the answer lies in the already visible side-lining of Dalit women's voices in the legal redressal of women's claims. The other part relates to the strategy of pressing the Indian government for bringing change through an international channel rather than a domestic one. As Keck and Sikkink assert, this boomerang effect could be used to 'persuade, pressurize, and gain leverage over much more powerful organizations and governments'.¹⁵² In fact, the boomerang effect has proven to be effective for Dalit women in driving home their intersectional position as sharing commonalities with women generally, in India and abroad, but also having crucial differences between them based on their caste and class. The CEDAW Committee has shown acute appreciation of this dynamic of sameness and difference,

¹⁴⁶ Stephen (n 88).

¹⁴⁷ See also the excellent online spaces like Savari which capture Dalit women's activism and work <http://www.dalitweb.org/?page_id=2> (accessed 12 October 2017).

¹⁴⁸ Other groups too have exploited the possibility of international networking and campaigning through CEDAW, including Muslim women and North Eastern women from India, especially through shadow reports. The CEDAW Committee has also shown exceptional engagement with sexual violence in Gujarat especially as against Muslim women: List of Issues and Questions by the Pre-Sessional Working Group: India (8 August 2006), CEDAW/C/IND/Q/3 [1]; Concluding Observations: India (2 February 2007), CEDAW/C/IND/CO/3 [67]–[68]; Concluding Observations: India (22 October 2010), CEDAW/C/IND/CO/SP.1 [38].

¹⁴⁹ Upasana Mahanta, 'Social Movements in a Neo-Liberal Era' in Heidi Moksnes and Mia Melin (eds), *Global Civil Society: Shifting Powers in a Shifting World* (Uppsala 2012) 140; Manisha Desai, 'Transnationalism: The Face of Feminist Politics Post-Beijing' (1999) 57 *International Social Science Journal* 319.

¹⁵⁰ The Hague Declaration on the Human Rights and Dignity of Dalit Women (21 November 2006) <www.indianet.nl/pdf/haguedeclaration.pdf> (accessed 5 October 2017).

¹⁵¹ Mahanta (n 149) 143.

¹⁵² Margaret E Keck and Kathryn Sikkink, 'Transnational Advocacy Networks in International and Regional Politics' (1999) 51(159) *International Social Science Journal* 89, 93. See also Sally Engle Merry, 'Gender Justice and CEDAW: The Convention on the Elimination of All Forms of Discrimination Against Women' (2011) 9 *Journal of Women of the Middle East and the Islamic World* 49, 70-71.

especially in the country reporting process where Dalit women's intersectional position has been highlighted in the shadow reports drafted by NGOs and then later drawn upon by the Committee in its concluding observations. For example, in the 58th review session alone when India's latest report was considered in 2014, no less than thirteen shadow reports draw attention towards specific forms of intersectional discrimination suffered by Dalit women.¹⁵³ For example, one of the reports highlighted in great detail the public nature of violence against Dalit women:

Dalit women are vulnerable to specific forms of violence. These forms include stripping and parading naked, violence associated with allegations of practicing witchcraft, sexual exploitation, trafficking and prostitution, including ritualized prostitution under Devadasi/Jogini practices, and domestic violence within inter-caste marriages. Statistics show that over 2,500 women have been killed on the suspicion of practicing witchcraft in the past 15 years. The recent manifestation of violence experienced by dalit women is while asserting their political participation.¹⁵⁴

Another report critiqued the lack of attention to vulnerability of disabled Dalit women.¹⁵⁵ These observations were later been picked up by the CEDAW Committee in its concluding observations issued in respect of India in 2014, wherein it noted that:

article 15 of the Constitution guarantees equal protection under the law for women and men and prohibits discrimination on the ground of sex. However the Committee is concerned at the absence of a comprehensive anti-discrimination law addressing all aspects of direct and indirect discrimination against women, and all the forms of intersectional discrimination, as explicitly listed in paragraph 18 of the Committee's General Recommendation 28 (2010).¹⁵⁶

In particular it expressed concern over: 'the escalation of caste-based violence, including rape, against women and girls, and the downplaying by key State officials of the grave criminal nature of sexual violence against women and girls'¹⁵⁷ and 'Dalit women and women from scheduled tribes fac[ing] multiple barriers in accessing justice, due to legal illiteracy, lack of awareness of their rights, and limited accessibility of legal aid.'¹⁵⁸ The UN Special Rapporteur on Violence Against Women,¹⁵⁹ UN High Commissioner for Human Rights,¹⁶⁰ and the Human Rights Council¹⁶¹ have all independently examined and criticised Dalit women's specific

¹⁵³ See in particular 'Multiple Discrimination against Dalit women' (2014) Alternative report to the UN Committee on the Elimination of all forms of Discrimination Against Women (CEDAW) for the examination of the 4th and 5th periodic reports of India at the 58th CEDAW session in July 2014, Joint submission by Navsarjan Trust, the All India Dalit Mahila Adhikar Manch (AIDMAM) and the International Dalit Solidarity Network (IDSN), which is dedicated wholly to Dalit women.

¹⁵⁴ Shadow Report submitted by the National Alliance of Women (India) (2014) <<http://pldindia.org/wp-content/uploads/2013/06/CEDAW-IV-Shadow-Report-Executive-Summary.pdf>> (accessed 12 October 2017).

¹⁵⁵ Shadow Report submitted by the Disabled People's International India (DPI India) to the (2013) <http://www.disabledpeoplesinternational.org/documents/DPI%20India_CEDAW%20Report.docx> (accessed 12 October 2017).

¹⁵⁶ CEDAW Committee, Concluding observations on the combined fourth and fifth periodic reports of India (18 July 2014) CEDAW/C/IND/CO/4-5 [8].

¹⁵⁷ *ibid* [10].

¹⁵⁸ *ibid* [34].

¹⁵⁹ Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, Mission to India: 10-21 January 2011, A/HRC/19/55/Add.1 (6 February 2012) [116]; Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, Mission to India A/HRC/26/38/Add.1 (1 April 2014) [15].

¹⁶⁰ UN High Commissioner for Human Rights, 'Fundamental Changes Needed in Wake of India Rape Tragedy' (December 2012) <<http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=12910&LangID=E>> (accessed 12 October 2017).

¹⁶¹ Human Rights Council, 'Report of the Special Rapporteur on Minority Issues', A/HRC/31/56 (28 January 2016) [72] [82] [85] [86] [96] [98] [100] [101].

vulnerabilities urging the government to strengthen law reform and enforcement on intersectional discrimination. A Human Rights Council Report of the Special Rapporteur on Minority Issues detailed the impact of caste-based discrimination on the rights to religion, work, physical security and liberty, and health of Dalit women and recognised in particular that ‘Caste is one of the factors that result in multiple and intersecting forms of discrimination against certain groups of women. Women and girls from low castes are particularly vulnerable to violation and denial of their rights in both public and private life.’¹⁶² A joint statement of the UN Special Procedures on the ‘Continued Plight of the Untouchables’ has stressed that, ‘Dalit women and girls are particularly vulnerable and are exposed to multiple forms of discrimination and violence, including sexual violence, on the basis of gender and caste.’¹⁶³

The biggest change in this form of engagement with the international women’s movement and human rights through CEDAW has been the recognition of *differences* amongst women, which in the early years of CEDAW were seen as either non-existent or unimportant to the movement based on the assumption of *commonality*. Nussbaum recognises this assumption as one of the most salient contributions (in addition to the direct enforcement of CEDAW in cases like *Vishaka*) of CEDAW to the women’s movement. But it appears that, at least in the case of Dalit women, it was the supplanting of this assumption with accounts of differences which extended the potential of CEDAW to be able to relate to women who were not simply women but women who were intersectionally disadvantaged. The case of ‘dramatic jump in numbers’ in the attendance at the Beijing Conference is thus explained not simply by previous successes but rather a very new phenomena at the time that intersectional groups like Dalit women took to campaigning transnationally. They were though, not alone in this. As Joan McFarland explains, the Beijing Platform For Action was in fact considered rather insufficient in improving the conditions of women living in extreme poverty. Thus, she explains that:

Indigenous women at Beijing...produced their own document because they felt that the Platform for Action did not sufficiently question the New World Order. They point out the lack of analysis in the Platform for Action, for example with reference to poverty [that the Platform For Action] ‘does not acknowledge that this poverty is caused by the same powerful nations and interests who have colonized us and are continuing to recolonize, homogenize, and impose their economic growth development model and monocultures on us. It does not present a coherent analysis of why it is that the goals of “quality, development, and peace,” become more elusive to women each day in spite of three UN conferences on women since 1975.’¹⁶⁴

In fact the Indigenous Women’s document was clear in pointing out that the strategic objectives and actions outlined in the Platform for Action like women’s equal access and full participation in decision-making, equal status, equal pay, and integration and mainstreaming of gender perspectives and analysis were going to remain ‘hollow and meaningless if the inequality between nations, races, classes, and genders [were] not challenged at the same time.’¹⁶⁵ Similarly, lesbians and queer women too made their distinct position well known at the Beijing Conference even

¹⁶² *ibid.*

¹⁶³ UN Special Procedures Joint Statement on the ‘Continued Plight of the Untouchables’ (May 2013) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=13352>> (accessed 12 October 2017).

¹⁶⁴ Joan McFarland, ‘From Feminism to Women’s Human Rights: The Best Way Forward?’ (1998) 22 *Atlantis* 50, 56.

¹⁶⁵ Beijing Declaration of Indigenous Women [16] <http://www.ipcb.org/resolutions/htmls/dec_beijing.html> (accessed 12 October 2017).

though the word ‘sexual orientation’ appeared nowhere in the Platform for Action.¹⁶⁶ But it was in part to their campaigning that the document did recognise ‘women’s right to make sexual decisions free of coercion, discrimination, and violence and presents a starting point for future organizing around the UN.’¹⁶⁷

In the final analysis, the disaggregated reading of the women’s movement through the lens of intersectional groups of Dalit women, indigenous women, and queer women, reveal how the women’s movement strengthened in their presence and drive to capitalise on CEDAW’s commitment to *all* women’s equality, not simply by relying on women’s common experiences but by mediating them with accounts of differences where necessary and relevant. In fact, beyond the ‘common purpose’ and ‘common set of demands’ of women, these groups were able to use CEDAW to articulate their purpose and set of demands which were not only common with all women but also quite distinct from women who did not share their intersectional position. It is in this sense that I believe CEDAW has succeeded in supporting and strengthening women’s movement—giving a platform for articulating and addressing patterns of disadvantage which are not only gender-based and hence common between women, but relate to women in everyway based on their race, class, caste, religion, sexual orientation, disability, age, marital status, etc, and thus point to the crucial differences between women. The stuff of genuine solidarity in CEDAW appears to be one of commonality *and* difference, rather than the former alone.

4.2 Turning Limitations into Possibilities

Whilst Nussbaum recounts CEDAW’s contribution to the women’s movement as largely positive, her analysis of CEDAW in relation to the issues of abortion, contraception, and sexual orientation is less so. Digging deeper into these issues again reveals a complicated view of how CEDAW has fared—at times in pointed and specific ways through its individual complaints and inquiry procedures in regards to women who suffer from intersectional disadvantage, rather than via broad proclamations for all women, say in general recommendations. The omission of the latter may then be less fatal than Nussbaum estimates in that the pointed responses within CEDAW jurisprudence through individual communications and inquiry procedure under the Optional Protocol can provide more robust responses to knotty issues than grand statements in the treaty or General Recommendations. Although one may not be a substitute for another, the presence of either should indicate possibilities and spaces in which CEDAW operates in more localised and hence effective ways, especially for women whose disadvantage has hitherto remained concealed and hence unattended.

For example, Nussbaum critiques the lack of clarity and stance of CEDAW on abortion and contraception. She finds not only the document, but also subsequent recommendations of the Committee to be wanting in these areas. This is one area where even though CEDAW may not have been able to make expressive progress of a general kind in its text or general recommendations, the CEDAW Committee has nevertheless been able to do justice in specific contexts and that too, intersectionally. The case of *LC v Peru* bears witness to this.¹⁶⁸ The case involved a minor girl who had attempted suicide when she fell pregnant after repeated sexual abuse. She

¹⁶⁶ Ara Wilson, ‘Lesbian Visibility and Sexual Rights at Beijing’ (1996) *Signs* 214.

¹⁶⁷ Beijing Platform for Action [96] <<http://www.un.org/womenwatch/daw/beijing/platform/>> (accessed 12 October 2017).

¹⁶⁸ Communication No. 22/2009 (views adopted on 4 November 2011).

survived but with major injuries which required immediate spinal surgery. Her surgery and the request to legally abort were declined by the hospital which concluded that her life was not in danger. By the time she had miscarried and underwent the required surgery, she was incapacitated from neck down. In these circumstances, the Committee found that the denial of abortion and surgery both constituted discrimination under CEDAW. While the only provision directly relevant to women's reproductive rights—article 16(e) on women's right to decide on the desired number of children—was decidedly inadequate in this situation, the Committee turned to the general right to health under article 12 to hold that the denial of abortion and spinal surgery disclosed a violation of that right.¹⁶⁹ The Committee found that the denial was 'even more serious considering that she was a minor and a victim of sexual abuse, as a result of which she attempted suicide.'¹⁷⁰ The Committee also used article 5 of CEDAW to find that the decision of the hospital to postpone the surgery due to the pregnancy was based on an acceptable stereotype which valued women's reproductive role and the protection of the foetus over the right to life, health and dignity of the mother.¹⁷¹ Further, the Committee used the general obligations under article 2 to find that the lack of an established procedure by which women could access abortion constituted a violation of their right to access an effective remedy under article 2.¹⁷²

Similarly, the Committee has used its sparingly invoked inquiry procedure to investigate grave or systemic violations under article 8 of the Optional Protocol to address concerns over artificial contraception in the specific context of Philippines.¹⁷³ The Committee issued its findings and recommendations in 2015 in relation to the Executive Orders No. 003 and 030 which regulated access to contraceptives in Manila. The Executive Order promoted natural family planning and discouraged artificial contraception, in particular, condoms, pills, intrauterine devices, surgical sterilization.¹⁷⁴ Despite the fact that the contraceptives were not explicitly prohibited, the Committee found that the Executive Order had in effect lead to a city-wide depression in availability of and access to contraception. This was deemed to be in violation of women's sexual and reproductive health rights. In particular, the Committee found that the 'ban particularly harmed disadvantaged groups of women, including poor women, adolescent girls and women in abusive relationships.' It systematically laid out the intersectional patterns of disadvantage afflicting women who belonged to these disadvantaged groups such that the denial of safe and affordable artificial contraception had particularly severe social, physical, and psychological consequences on them, in addition to intensifying their poverty.¹⁷⁵ It concluded that the Philippines had violated its obligations under CEDAW and was responsible for grave and systematic violations of the rights under: article 12, read alone; article 12, read in conjunction with articles 2(c), 2(d), 2(f), 5 and 10(h); and article 16(1)(e). The Committee issued extensive guidelines directing the Philippines to, amongst other things,

¹⁶⁹ *ibid* [8.15].

¹⁷⁰ *ibid*.

¹⁷¹ *ibid*.

¹⁷² *ibid* [8.17]

¹⁷³ The inquiry procedure has only been used three times in respect of Canada, Mexico, and the Philippines, and is limited to serious, grave or systematic violations by a State party of rights covered under CEDAW.

¹⁷⁴ CEDAW Committee, Inquiry into access to contraception in Manila, CEDAW/C/OP.8/PHL/1 (22 April 2015).

¹⁷⁵ *ibid* [34].

address the unmet need for contraception, especially in Manila, with a particular focus on economically disadvantaged women and adolescent girls, by ensuring universal and affordable access to the full range of sexual and reproductive health services, commodities and related information, which must include the availability of the safest and most technologically advanced methods of contraception, including oral contraception and emergency contraception, intrauterine devices and ligation services, and adequate provision in national and local government budgets for a sufficient supply of such contraceptive methods in all public health facilities, with a particular focus on local government units with low contraceptive prevalence rates¹⁷⁶

The Philippines inquiry report is the most extensive statement of the CEDAW Committee in the matter of sexual and reproductive rights of women, especially in regards to artificial conception. While it does not constitute ‘general’ statements or ‘universal’ affirmations on rights applicable to all CEDAW State Parties, it stands for an unambiguous inclusion of artificial contraception as part of the conspectus of rights under CEDAW in this context and thus by extension, hinting at the kind of conditions which can violate this right and its consequent obligations in other contexts.

In both *LC v Peru* and the Philippines inquiry, the Committee turned, what Nussbaum calls ‘utter silence about artificial contraception and abortion rights’,¹⁷⁷ into individual rights and enforceable obligations on the matter. It did so by interpreting the ‘too vague to lead to legal implementation’¹⁷⁸ provision in article 16(e), the general right to health under article 12, and the transformative obligations under article 5 in the specific context of abortion and contraception to create concrete legal rights and duties.

Nussbaum’s other area of concern is the neglected issue of sexual orientation in CEDAW. Nussbaum’s take on this seems to be that, while there has been an ‘utter failure’ in addressing issues of sexual orientation, the matter is nevertheless of ‘longstanding controversy’ such that despite our theoretical or moral views on homosexuality, ‘there is still the strategic issue to consider’.¹⁷⁹ The strategic issue is of addressing sexual orientation in the women’s movement and eventually jeopardising the movement since sexual orientation remains a contentious topic in many countries. Nussbaum thus asks: ‘Should a feminist in India, where sodomy is still a felony, taint her cause by this alliance?’¹⁸⁰

Framing the inclusion of issues of sexual orientation in the women’s movement as a ‘strategic issue’ undermines the value of CEDAW as a uniform and inclusive turf (rather than a hierarchical basement) on which intersectional issues need not simply be included when they are ‘strategically’ viable but because without them the movement and women’s human rights remain theoretically deficient and un-transformative. To recall, intersectionality expands the theoretical basis for what constitutes ‘discrimination’ or ‘sex discrimination’ by not only including experiences of those who are disadvantaged only as women but also those who belong to multiple disadvantaged groups at once, such a lesbian, bisexual, intersex or transsexual women, just as disabled, aged, minor, single, Dalit, Black and Roma women. By pointing out the specific nature of disadvantage suffered by intersectional groups, as both similar to yet different from discrimination suffered by women on the basis of sex alone, intersectionality imparts the key theoretical lesson that women’s

¹⁷⁶ *ibid* [52].

¹⁷⁷ Nussbaum (n 4) 607.

¹⁷⁸ *ibid* 608.

¹⁷⁹ *ibid* 608-609.

¹⁸⁰ *ibid* 609.

disadvantage cannot be solely construed in terms of commonalities based on sex or gender. It supplements commonality with the difference other identities or disadvantages make in the experience of sex or gender discrimination. Intersectionality thus enlarges our understanding of what women's experiences really are, by representing the diversity of women and women's lives and strengthening the assumptions around commonality by testing them in relation to intersectional groups. Construed this way, the exclusion of queer women in CEDAW is not simply a choice about strategy, i.e., of whether excluding them facially could make for a more successful women's movement overall. Viewed in the light of intersectionality, the exclusion of queer women is a fundamentally inadequate construction of a women's movement and human rights because it relies on a limited (inadequate) conception of women and women's experiences. So by reducing the inclusion of intersectional groups to a mere question of strategy, Nussbaum misjudges the formative significance of intersectionality in understanding and addressing discrimination in women's human rights. A formative understanding of intersectionality in the women's movement and women's human rights especially as incorporated in CEDAW, would make it unacceptable for queer women or other intersectional groups of women who are Black, Dalit, indigenous, disabled etc, to be passed over for others in the movement. Their substantive inclusion would be important for the movement for it would lack any theoretical coherence otherwise.

This is why even if Nussbaum is posing the question of whether the feminist movement must align with the queer movement as a matter of 'strategic essentialism', the question remains a problematic one. Going by Gayatri Chakravorty Spivak's understanding of strategic essentialism, intra-group differences can be set aside to create a base of commonality for grounding political movements.¹⁸¹ Martha Minow,¹⁸² Tracy Higgins¹⁸³ and Judith Butler¹⁸⁴ similarly see the value in being able to build political coalitions based on commonness despite differences between women. And yet, strategic essentialism runs the danger of lapsing into essentialism when it stops critiquing its own reliance on theoretically unviable categories.¹⁸⁵ Nussbaum's consideration of her own question is one which gives more credence to the debate over the 'unpopular cause' of queer issues when 'many feminists in the global context believe that homosexuality is immoral'.¹⁸⁶ She no doubt acknowledges that in the exclusion of queer women from CEDAW 'a price was paid, and possibly a type of coherence and integrity lost', she does so by first acknowledging that still, the 'strategic point was huge'.¹⁸⁷ Such a framing appears to be far from the kind of strategic essentialism deemed defensible, because it doubts the inclusion of queer women as part of the movement at all, and in fact goes for progress which excludes them, rather than eventually helping them through momentary exclusion of strategic essentialism. Thus, the defence of strategic essentialism cannot be raised when one fundamentally doubts a theoretically more inclusive enunciation of categories like

¹⁸¹ Gayatri Chakravorty Spivak, 'Subaltern Studies: Deconstructing Historiography' in Gayatri Chakravorty Spivak and Ranjit (eds), *In Other Worlds: Essays in Cultural Politics* (OUP 1998) 197.

¹⁸² Martha Minow, 'The Supreme Court Term 1986, Foreword: Justice Engendered' (1987) 101 *Harvard Law Review* 10, 13-17.

¹⁸³ Tracy E Higgins, 'Anti-Essentialism, Relativism, and Human Rights' (1996) 19 *Harvard Women's Law Journal* 89, 100.

¹⁸⁴ Judith Butler, *Bodies That Matter: On the Discursive Limits of Sex* (Routledge 2011) ch 6-8.

¹⁸⁵ Anne Phillips, 'What's Wrong with Essentialism?' (2010) 11 *Distinktion: Scandinavian Journal of Social Theory* 49.

¹⁸⁶ Nussbaum (n 4) 609.

¹⁸⁷ *ibid.*

‘women’ or ‘sex discrimination’ and violation of ‘women’s human rights’, which is based on an appreciation of both commonalities and differences. One can only deploy strategic essentialism by appreciating not denying difference, because otherwise they are nothing but essentialising.

Eventually, the consequences of the choice Nussbaum poses with her question fall on women who are already marginalised, i.e. queer women, that they are excluded both theoretically and strategically from the women’s movement. Such a choice should not morally exist in a feminist discourse which aims to build solidarity on the ground of commonness *and* differences. Ignoring the differences and letting some fall by the wayside of the women’s movement does not solve the problems for queer women either substantively or strategically.¹⁸⁸ It is then not simply about being mindful of differences, but instead about treating them not as differences—exceptional, stray, and removed from the mainstream or the collective—but as central to the conversation about how women’s human rights function on ground.

So issues of sexual orientation must appear more strongly in CEDAW and its jurisprudence not because they strategically make sense but because their exclusion chips away at the progress the movement makes. CEDAW may indeed have been silent on issues of sexual orientation and gender identity but there are some signs that CEDAW has provided a site for these issues to be asserted and addressed. Just like the development of CEDAW jurisprudence in relation to Dalit women and the intersectional position of women defined simultaneously by gender, caste and class, the development in relation to queer women too appears to be driven by networks of and NGOs representing queer women who have taken to the boomerang effect to argue for greater gender justice at home via CEDAW mechanisms like participating in the country reporting process through shadow reports. This is most visible in the shadow reports which are in turn taken up by the CEDAW Committee in its reports and concluding comments.¹⁸⁹ There is no doubt though, that there is much more work to be done. But possibilities for CEDAW to do so are being keenly explored,¹⁹⁰ not only because there is any more resolution than there previously was about the morality of these issues or that they have become strategically viable. Rather, as this article has tried to show, CEDAW would fail in its transformative goals if it fails to

¹⁸⁸ As Tracy Higgins aptly remarks: ‘Surface similarities, buttressed by a presumption of commonality, may lead to a misdiagnosis of the causes of women’s oppression and to ill-conceived policy solutions.’ Higgins (n 183) 122.

¹⁸⁹ See for example Singapore’s experience of this, which is similar to India’s in that sodomy still remains illegal; but academics and activists alike have pressed CEDAW Committee to address queer issues and have had relative success (in terms of the boomerang effect) in that the CEDAW Committee has categorically asked the government to eliminate discrimination against women based on their sexual orientation and gender identity. See Sayoni’s Shadow Report ‘Report on Discrimination against Women in Singapore based on Sexual Orientation and Gender Identity’ (10 October 2010) <<https://iglhrc.files.wordpress.com/2011/07/sayoni-singapore-cedaw-shadow-report-2011.pdf>> (accessed 12 October 2017); CEDAW Committee’s concluding observations in its 49th Session in relation to Singapore (5 January 2012) CEDAW/C/SGP/CO/4/Rev.1; Shawna Tang, *Postcolonial Lesbian Identities in Singapore: Re-thinking Global Sexualities* (Routledge 2017) ch 5. Even in harder cases like those of Russia, the CEDAW Committee has been used as a platform for canvassing on behalf of queer women. See the shadow report submitted by Inter-Regional Social Movement “Russian LGBT Network” (July 2010) <http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/LGBTNetwork_RussianFederation46.pdf> (accessed 12 October 2017).

¹⁹⁰ Dianne Otto, ‘Queering Gender [Identity] in International Law’ (2015) 33 *Nordic Journal of Human Rights* 299; Elise Meyer, ‘Designing Women: The Definition of “Woman” in the Convention on the Elimination of All Forms of Discrimination Against Women’ (2016) 16 *Chicago Journal of International Law* 553.

embrace intersectionality substantively, and thus attend to the situation of women by actually understanding the complex nature of international discrimination and violations suffered by women who belong to multiple disadvantaged groups, which isn't always similar to disadvantage suffered by women on the basis of sex or gender alone. The argument for intersectionality is thus qualitative not simply strategic or even scalar in judging the transformative nature of the progress made under CEDAW.

The upshot of digging into issues which Nussbaum identified as 'serious defects', is that it is hard to judge the defects of CEDAW in a macro, acontextual way. The ambit of CEDAW has gone far beyond the text of the treaty itself and has been developed by the Committee under the Optional Protocol, in its reporting procedure and through the General Recommendations. The possibility of multi-dimensional intervention has allowed the CEDAW Committee to contribute to the women's movement and women's human rights in particular contexts and in relation to particular groups which have demanded close attention. This has made CEDAW not only overcome its facial defects but transform cases of limitations into spaces of possibilities. But it requires a disparate and targeted reading of the vast jurisprudence created under CEDAW to be able to appreciate that: disparate as in looking into CEDAW's multiple sites of intervention and targeted as in zooming in on certain issues and particular rights in question, contexts in which they operate, and the protectorate they affect the most.

5. Conclusion

In the scheme of the basement metaphor, progress implies upward movement of those inhabiting the ceiling of the basement to the floor above. Transformation belies this linear trajectory. Transformation implies a complete overhaul which upturns the complex and stratified structure of the basement itself. It is thus intersectional in nature in that it touches the lives of all, not some, and especially those who suffer from several and severe forms of disadvantages associated with structures of racism, sexism, classism, casteism, ableism, ageism, homophobia, transphobia, etc. Does CEDAW believe in such transformation? Has it achieved it? That is, has it been able to invert systems of disadvantage and create a space of full equality and fulfilment of human rights for all women, including those who inhabit the depths of the basement and suffer from intersectional forms of violations? Or has its progress been partial and simplistic—touching the issues and lives of women who are relatively privileged, i.e. those who inhabit the ceiling?

This article has engaged with these questions in light of intersectionality theory, as applied to the position of Dalit women within the Dalit feminist discourse in India, and in response to Martha Nussbaum's account of the progress of women's human rights under CEDAW. Like Nussbaum, I found that women have made progress especially through CEDAW. But the progress that Nussbaum marked, seemed to belong to a certain cross-section of women not all of whom suffer from multiple and intersecting forms of discrimination. It is thus not transformative in nature. This article argued for an assessment of women's human rights and CEDAW through an intersectional lens such that what counts as progress in the women's movement belongs to all women who suffer from discrimination not solely on the basis of gender but in everyway gender discrimination is experienced and intensified because of other forms of discrimination including that based on women's race, colour, religion, caste, age, disability, sexual orientation, etc. Intersectionality is thus not only about *who* is included but also about the substantive issues which get

understood as and included in women's issues. At its core, it reconfigures our understanding of the substantive content of women's rights in relation to the actual violations, disadvantages, and deprivations women suffer.

CEDAW appears to have had a mixed record in appreciating this. Much of CEDAW's success story is told through the lens of examples which have ignored intersectional discrimination and thus the transformative potential of CEDAW. The case of *Vishaka* which sidelined Bhanwari Devi and Dalit women, is symptomatic of this reading of women's progress. Yet, over the years, CEDAW jurisprudence has grown to appreciate and address intersectional discrimination in the realisation of women's human rights and has thus gone through an 'intersectional transformation' of sorts. The developments of the last decade in this regard, show immense promise in positing a vision and course for the radical reimagination of what women's rights and women's lives can be. It is these developments in relation to particular contexts and States and involving particular rights and forms of violations which have the potential to make a transformative breakthrough in women's human rights through targeted intervention—via the General Recommendations, individual communications procedure and the inquiry procedure under the Optional Protocol, and shadow reporting before the CEDAW Committee and other such transnational forms of campaigning. And it is this transformation of CEDAW which counts for transformative progress in the development of women's human rights and the women's movement and one that will in turn continue to provide the turf for struggles which are inclusive and ultimately successful.